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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~500.~~ 3-19

THE BOARD OF SUPERVISORS OF WAYNE COUNTY, OLIVER HOLMES, THOMAS L. COOPER. WILLIAM SHAFFER, ET AL., PLAINTIFFS IN ERROR,

vs.

JOHN W. KENNICOTT, JOSEPH W. WARD, ET AL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 2, 1878.

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Pleas in the circuit court of the United States of America for the southern district of Illinois, held at the city of Springfield, in said district, before the Hon. Samuel H. Treat, district judge of said district, and, in the absence of the Hon. Thomas Drummond, judge of the seventh judicial circuit pro tempore, sole judge of said court, on Tuesday the 14th day of May, at the January term of said court, in the year of our Lord eighteen hundred and seventy-eight, and of our Independence the one hundred and second year.

J. A. JONES, *Clerk.*

JOHN W. KENNICOTT, JOSEPH W. WARD, Andrew H. Ward, Ebenezer W. Stone, Catherine Earle, and Abraham Riker, executors of Morris J. Earle, deceased, Francis E. Parker and William B. Bacon, administrators, etc., and Eliza A. Wakefield, administratrix of Cyrus Wakefield, deceased, J. Sargent Smith, Thomas Upton, Maria Myers, administratrix of Austin Myers, deceased, Thomas Upton, executor of John W. Emerson, deceased, John H. Brown, Henry V. Davis, William R. Hodges, John L. Priest, William C. Plunkett, John J. Dixwell, Joseph Smith, Arthur F. Gould, Joseph Burnett, and William
2 L. Ralston, plaintiffs, who sue for the use of themselves and of Roxana Crego, Richard P. Glen, James S. Hendrickson, Oliver D. Taylor, L. F. Reed, Clark L. Potter, Joseph Maxelbaum, James Q. Faircloth, Caleb Underhill, William C. Potter, Thomson E. F. Randolph, Hosea Birdsall, James F. Hendrickson, & Benjamin Hise,

vs.

OLIVER HOLMES, THOMAS L. COOPER, William Shaffer, R. T. Forth, Edward Bonham, A. B. Rider, L. I. Rider, John L. Handley, John A. Moffett, John Keen, jr., A. M. Funkhouser, C. C. Boggs, Willliam W. George, James McCartney, J. G. Crews, D. W. Barkley, T. A. Martin, N. E. Roberts, O. W. Harvey, John I. Farmer, J. V. Baugh, John R. Carter, Lafayette Butler, C. W. Summers, Jacob Hall, and Fred Bestow, & the Board of Supervisors of Wayne County, impleaded with Daniel L. McCauley, O. P. Patterson, G. J. George, D. C. Graves, Francis Kelly, T. J. Mayers, John D. Simpson, N. N. Borah, William Halloway, E. W. Mabry, W. C. Kennerly, Moses Renfrow, Thomas J. Butler, Stephen Fils, James M. Butler, M. B. Kinerly, Daniel Talkington, J. E. Kinnerly, D. K. Felix, John Felix, William J. Vaughan, Samuel Berry, Marion T. Berry, A. W. Womack, C. Walter, I. M. Hawes, M. R. Whit-
3 son, Henderson Glidewell, Aaron B. T. Miller, George W. Ritcher, Caleb Crews,

} Debt.

John Harvey, T. W. Dickey, B. F. Harris, John Walton, A. G. Berah, J. C. Staton, John W. Cissna, H. M. Twadell, George T. Lawrence, William H. Grant, James B. Manahan, M. M. Wheeler, H. B. Johnson, William Pasco, William Stephens, Jacob Mather, William R. Barr, William H. Stephens, George G. Feather, E. J. Miller, James W. McBill, C. M. Williams, and Robert P. Hanna.

SOUTHERN DISTRICT OF ILLINOIS, *ss:*

The above named plaintiffs put in their place J. A. McClernand, esq., and N. M. Broadwell, esq., their attorneys, against said defendants, who put in their place Edwin Beecher and C. C. Boggs, esq'r's, their attorneys, at a suit in debt.

SOUTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that heretofore, to wit, on the 27th day of December, in the year of our Lord eighteen hundred and seventy-seven, a summons was issued in said cause out of the office of the clerk of said court, directed to the marshal of said district to execute, which said
4 summons, together with the return of the marshal thereon, are in the words and figures following, to wit:

Summons.

Circuit court of the United States of America, southern district of Illinois, ss:

The United States of America to the marshal of the southern district of Illinois, greeting:

We command you to summon The Board of Supervisors of Wayne County, Daniel L. McCawley, William Shaffer, Oliver Holmes, John L. Handley, John A. Moffett, John Keen, jr., O. P. Patterson, A. M. Funkhouser, C. C. Boggs, William W. George, G. J. George, James McCartney, Jo. G. Crews, D. C. Graves, Francis Kelly, D. W. Barkley, T. A. Martin, N. E. Roberts, O. W. Harvey, T. J. Mayers, R. T. Forth, John J. Farmer, Joel N. Baugh, John D. Simpson, N. N. Borah, Edward Bonham, William Halloway, L. J. Rider, A. B. Rider, E. W. Mabry, John R. Carter, Lafayette Butler, W. C. Kennerly, Moses Renfrow, Thomas J. Butler, Stephen Fils, James M. Butler, M. B. Kinerly, Daniel Talkington, J. E. Kinnerly, D. K. Felix, John Felix, William J. Vaughan, Samuel Berry, Marion T. Berry, A. W. Womack, C. Walter, I. M. Hawes, M. R. Whitson, Henderson Glidewell, Aaron B. Mills, T. L. Cooper, George W. Ritcher, Caleb Crews, Fred Bestow, John Harvey, C. W. Summers, Jacob Hall, T. W. Dickey, B. F. Harris, John Walton, A. G. Borah, J. C. Staton, John W. Cissna, H. M. Twadell, George T.
5 Lawrence, William H. Grant, James B. Manahan, M. M. Wheeler, H. B. Johnson, William Pasco, William Stephens, Jacob Mather, William R. Barr, William H. Stephens, George G. Feather, E. J. Miller, James Y. McBill, C. M. Willison, and Robert P. Hanna, if found in your district, to be and appear before our judges of our circuit court of the United States for the southern district of Illinois, on the first day of the next term thereof, to be held at Springfield, in the district aforesaid, on the first Monday of January next, to answer unto John W. Kennicott,

Joseph W. Ward, Andrew H. Ward, Ebenezer W. Stone, Catherine Earl and Abraham Riker, executors of Morris J. Earl, deceased; Francis E. Parker and William B. Bacon, administrators, and Elizabeth A. Wakefield, administratrix of Cyrus Wakefield, deceased; J. Sargent Smith, Thomas Upton, Maria Myers, administratrix of Austin Myers, deceased; Thomas Upton, executor of John W. Emerson, deceased; John H. Brown, Henry V. Davis, William R. Hodges, John L. Priest, William C. Plunkett, John J. Dixwell, Joseph Smith, Arthur F. Gould, Joseph Burnett, and William L. Ralston, of a plea of debt, forty thousand dollars ($40,000.00), to their damage, as they allege, of forty thousand dollars ($40,000.00). And have you then and there this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Springfield
6 aforesaid, this twenty-seventh day of December, in the year of our Lord one thousand eight hundred and seventy-seven, and of our Independence the one hundred and second year.

[L. S.] J. A. JONES, *Clerk.*

Return of marshal.

Executed this writ on the 28th day of Dec., 1877, by reading the same to Thomas L. Cooper, Oliver Holmes, Wm. Shaffer, R. T. Forth, Edward Bonham, A. B. Rider, L. I. Rider, John L. Handley, John A. Moffett, John Keen, jr., A. M. Funkhouser, C. C. Boggs, Wm. W. George, James McCartney, J. G. Crews, D. W. Barkley, F. A. Martin, N. E. Roberts, O. W. Harvey, John I. Farmer, J. V. Baugh, John R. Carter, Lafayette Butler, C. W. Summers, Jacob Hall, Fred Bestow; other defendants not found.

E. R. ROE,
U. S. Marshal,
By N. B. PRETTYMAN,
Deputy.

(Endorsed:) Filed January 7, 1878. J. A. Jones, clerk.

And afterwards, to wit, on the 28th day of December, in the year A. D. 1877, came said plaintiffs by their said attorneys and filed in said clerk's office their declaration and instrument sued on in said cause, which said declaration and instrument sued on are in the words and figures following, to wit:

7 *Declaration.*

UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

In the circuit court of the United States of America, within and for the said district, January term, A. D. 1878.

John W. Kennicott, Joseph W. Ward, Andrew H. Ward, Ebenezer W. Stone, Catherine Earl and Abraham Riker, executors of Morris J. Earl, deceased; Francis E. Parker and William B. Bacon, administrators, and Eliza A. Wakefield, administratrix of Cyrus Wakefield, deceased; J. Sargent Smith, Thomas Upton, Maria Myers, administratrix of Austin Myers, deceased; Thomas Upton, executor of John W. Emerson, deceased; John H. Brown, Henry V. Davis, William R. Hodges,

John L. Priest, William C. Plunkett, John J. Dixwell, Joseph Smith, Arthur F. Gould, Joseph Burnett, and William L. Ralston, the plaintiffs in this suit, who sue for themselves, and Roxana Crego, Richard T. Glen, James S. Hendrickson, Oliver D. Taylor, L. F. Reed, Clark L. Potter, Joseph Maxelbaum, James Q. Faircloth, Caleb Underhill, William C. Potter, Thomson E. F. Randolph, Hosea Birdsall, James F. Hendrickson, and Benjamin Hise, complain of the board of supervisors of Wayne County, Daniel L. McCawley, William Shaffer, Oliver
8 Holmes, John L. Handley, John A. Moffett, John Keen, jr., O. P. Patterson, A. M. Funkhouser, C. C. Boggs, Wm. W. George, G. J. George, James McCartney, Jo. C. Crews, D. C. Graves, Francis Kelley, D. W. Barkley, T. A. Mather, N. E. Roberts, O. W. Harvey, T. J. Mayers, R. T. Forth, John J. Farmer, Joel V. Baugh, John D. Simpson, N. N. Borah, Edward Bonham, William Holloway, L. J. Rider, A. B. Rider, E. W. Mabry, John R. Carter, Lafayette Butler, W. C. Kinnerly, Moses Renfrow, Thomas J. Butler, Stephen Files, James M. Butler, M. B. Kinnerly, Daniel Talkington, J. E. Kinnerly, D. K. Felix, John Felix, William J. Vaughan Samuel Berry, Martin T. Berry, A. W. Womack, C. Walter, I. M. Hawes, M. R. Whitson, Henderson Glidewell, Aaron B. Mills T. L. Cooper, Geo. W. Ritcher, Caleb Crews, Fred. Bestow, John Harvey, C. W. Summers, Jacob Hall, T. W. Dickey, B. F. Harris, John Walton, A. G. Borah, J. C. Staton, John W. Cissna, H. M. Twadell, George T. Lawrence, William H. Grant, James B. Manahan, M. M. Wheeler, H. B. Johnson, William Pasco, William Stephens, Jacob Mather, William R. Barr, William H. Stephens, George G. Feather, E. J. Miller, James Y. McBill, C. M. Willison, Robert P. Hanna, the defendants, that they render to the plaintiffs the sum of forty thousand dollars which said defendants owe to and unjustly detain from the plaintiffs.

9 For that whereas the said defendants, on the 18th day of August, A. D. 1874, at Springfield Illinois, that is to say at the district aforesaid, made their certain writing obligatory, sealed with their seals, and here to the court shown, and then and there delivered the same to the plaintiffs, whereby the said board of supervisors of Wayne County, as principal, and the other defendants as sureties, acknowledge themselves to be held and firmly bound unto the plaintiffs in the penal sum of *of* forty thousand dollars, for the payment of which they bound themselves jointly and severally by said writing obligatory, which said writing obligatory was subject to a certain condition thereunder written, whereby it was provided that the board of supervisors of Wayne County, Illinois, impleaded, &c., had prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered on the 25th day of June, A. D. 1874, by the circuit court of the United States for the southern district of Illinois, in a certain suit wherein the above-named plaintiffs were plaintiffs, and the said board of supervisors impleaded, &c., were defendants.

And whereas it was further provided that if the above named board of supervisors impleaded, &c., should prosecute their said appeal with effect and should answer all damages and costs if they should fail
10 to make good their plea, then said writing obligatory should be void; otherwise to remain in full force and virtue, as by the said writing obligatory now here shown to the court will appear; and although afterwards, to wit, on the 13th day of April, A. D. 1877, at the term of the Supreme Court of the United States then being held, said decree was affirmed by said Supreme Court, and judgment rendered against said boad of supervisors for the costs of said court for a large

sum, to wit, $1,000.00, as by the record of said Supreme Court will more fully appear; and although a large amount of damages hath accrued to the said plaintiffs by the failure of the said board of supervisors to make good their plea, to wit, the amount of one hundred thousand dollars [consisting of forty thousand dollars of interest which accrued on said decree during the pendency of said appeal, which is wholly unpaid; and of $200,000 of said decree remaining unsatisfied by sale of the lands ordered by said decree, and of fifty thousand dollars depreciation in the value of said lands during the pendency of said appeal, and of $25,000.00, attorneys' fees for attending to said appeal, and $50,000 taxes on said lands during the pendency of said appeal.]

(Part included in brackets marked on the margin:) Amendment.

11 Yet the said plaintiffs in fact say that the said board of supervisors have not paid the amount of said damages or costs aforesaid, or any or either of them or any part thereof, according to the tenor and effect of said writing obligatory, and as well the said writing obligatory as the said decree and judgment for costs still remain in full force and effect, in no wise satisfied, vacated, or discharged, whereby and according to the force and effect of the said writing obligatory an action hath accrued to the plaintiffs to demand and have of the defendants the sum of forty thousand dollars.

Yet the said defendants, although often requested so to do, have not as yet paid the said sum of $40,000.00 or any part thereof, to the damage of said plaintiffs of forty thousand dollars, and therefore they bring their suit, &c.

J. A. McCLERNAND &
N. M. BROADWELL,
Att'ys for Pl'ffs.

(Endorsed:) Filed December 28, 1877. J. A. Jones, clerk.

Bond sued on.

Supreme Court of the United States.

JOHN W. KENNICOTT, JOSEPH W. WARD, Andrew H. Ward, Ebenezer W. Stone, Catherine Earl, and Abraham Riker, executors of Morris J. Earl, deceased, Francis E.
12 Parker and William B. Bacon, administrators, and Eliza A. Wakefield, administratrix, of Cyrus Wakefeld, deceased, J. Sargent Smith, Thomas Upham Maria Myers, administratrix of Austin Myers, deceased, Thomas Upham, executor of John W. Emerson, deceased, John H. Brown, Henry V. Davis, William Hodges, John L. Priest, William C. Plunkett, John J. Dixwell, Joseph Smith, Arthur F. Gould, Joseph Burnett, and William L. Ralston,
vs.
THE BOARD OF SUPERVISORS OF WAYNE County, Illinois, impleaded with the Mount Vernon Railroad Company. } Chancery.

Know all men by these presents that we, the Board of Supervisors of Wayne County, Daniel L. McCawley, William Shaeffer, Oliver Holmes,

John L. Handley, et al., are held and firmly bound unto the said complain , John W. Kennicott, Joseph W. Ward, and others, in the sum of forty thousand dollars, to be paid to the said complainants, John W. Kennicott, Joseph W. Ward, and others, their heirs or assigns. To which payment well and truly to be made we bind ourselves, and each of us, jointly and severally, and our, and each of our, heirs, executors, and administrators, firmly by these presents. Sealed with our
13 seals and dated this 18th day of August, A. D. 1874.

Whereas the above-named Board of Supervisors of Wayne County, Illinois, impleaded with the Mount Vernon Railroad Company, have prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the circuit court of the United States for the southern district of Illinois on the twenty-fifth day of June, A. D. 1874:

Now, therefore, the condition of this obligation is such that if the above-named Board of Supervisors of Wayne County, Illinois, impleaded with the Mount Vernon Railroad Company, and answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

THE BOARD OF SUPERVISORS OF WAYNE COUNTY, ILL'S,
By JOSEPH B. SCUDAMORE, [SEAL.]
Chairman Board of Supervisors, Wayne County, Illinois.

Attest:
[SEAL OF WAYNE CO. COURT.] JOHN MORRIS,
County Clerk, Wayne County, Illinois.

D. K. Felix.	[seal.]	Daniel L. McCawley.	[seal.]
John I. Felix.	[seal.]	Wm. Shaeffer.	[seal.]
Wm. I. Vaughan.	[seal.]	Oliver Holmes.	[seal.]
his Samuel + Berry. mark.	[seal.]	John L. Handley.	[seal.]
Marion T. Berry.	[seal.]	John A. Moffett.	[seal.]
14 A. W. Womack.	[seal.]	John Keen, jr.	[seal.]
C. Walter.	[seal.]	O. P. Patterson.	[seal.]
I. M. Hawes.	[seal.]	A. M. Funkhouser.	[seal.]
M. K. Whitson.	[seal.]	C. C. Boggs.	[seal.]
Henderson Glidewell.	[seal.]	Wm. W. J. George.	[seal.]
Aaron B. Miller.	[seal.]	G. J. George.	[seal.]
T. L. Cooper,	[seal.]	James McCartney.	[seal.]
Geo. W. Ritcher.	[seal.]	Jo. G. Crews.	[seal.]
Caleb Crews.	[seal.]	D. C. Graves.	[seal.]
Fred. Bestow.	[seal.]	Francis Kelly.	[seal.]
John Harvey.	[seal.]	D. W. Barkley.	[seal.]
C. W. Summers.	[seal.]	T. A. Martin.	[seal.]
Jacob Hall.	[seal.]	N. E. Roberts.	[seal.]
T. W. Dickey.	[seal.]	O. W. Harvey.	[seal.]
B. F. Haris.	[seal.]	T. J. Mayers.	[seal.]
John Walton.	[seal.]	R. T. Forth.	[seal.]
A. G. Borah.	[seal.]	John I. Farmer.	[seal.]
J. C. Staton.	[seal.]	Joe V. Baugh.	[seal.]
John W. Cissna.	[seal.]	John D. Simpson.	[seal.]
H. M. Twadell.	[seal.]	N. N. Borah.	[seal.]
Geo. T. Lawrence.	[seal.]	Edward Bonham.	[seal.]
William H. Grant.	[seal.]	William Holloway.	[seal.]

	James B. Manahan.	[seal.]	L. J. Rider.	[seal.]
	M. M. Wheeler.	[seal.]	A. B. Rider.	[seal.]
	H. B. Johnson.	[seal.]	E. W. Mabry.	[seal.]
	Wm. Pasco.	[seal.]	John R. Carter.	[seal.]
	William Stephens.	[seal.]	Lafayette Butler.	[seal.]
	Jacob Martin.	[seal.]	W. C. Kinnerly.	[seal.]
15	Wm. R. Barr.	[seal.]	his Moses + Renfrow. mark.	[seal.]
	Wm. H. Stephens.	[seal.]	Thomas J. Butler.	[seal.]
	George G. Feather.	[seal.]	Stephen Fils.	[seal.]
	E. J. Miller.	[seal.]	James M. Butler.	[seal.]
	James Y. McCrill.	[seal.]	his M. B. + Kinerly. mark.	[seal.]
	C. M. Willison.	[seal.]	his Daniel + Talkington. mark.	[seal.]
	R. P. Hanna.	[seal.]	J. E. Kinnerly.	[seal.]

STATE OF ILLINOIS,
Wayne County, ss :

I, John Morris, clerk of the county court in and for said county, do hereby certify that the signatures to the foregoing bond are genuine, and that the parties are well known to me as being far more than ample security for said bond.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Fairfield, this 21st day of August, A. D. 1874.

[L. S.] JOHN MORRIS,
County Clerk.

Approved this 21st day of August, 1874.

S. H. TREAT,
Dist. Judge.

(Endorsed:) Filed December 28, 1877, in gen'l No. 5255. J. A. Jones, clerk.

16 And afterwards, to wit, on the 9th day of January, in the year of our Lord eighteen hundred and seventy-eight, came said defendant, James McCartney, pro se, and filed in said clerk's office his plea in said cause; which said plea is in the words and figures following, to wit:

Plea of James McCartney.

United States circuit court, southern district of Illinois, January term, 1878.

THE UNITED STATES OF AMERICA,
State of Illinois, ss :

KENNICOTT ET AL.
vs. } Debt.
WAYNE COUNTY ET AL.

And now comes James McCartney, one of the defendants in the above

entitled cause in his own proper person, comes and defends the wrong and injury, when, &c., and says that he does not owe the said sum of money above demanded, or any part thereof, in manner and form as the plaintiff' have above complained against him; and of this the defendant puts himself upon the country, &c.

JAMES McCARTNEY,
Pro se.

(Endorsed:) Filed January 9th, 1878. J. A. Jones, clerk.

17 And then afterwards, to wit, on Monday, the 14th day of January, at the January term of said court, in the year last aforesaid, the following proceedings were had in said court in said entitled cause, and entered of record, to wit:

Leave to amend declaration and rule to plead.

JOHN W. KENNICOTT ET AL.
vs.
OLIVER HOLMES ET AL. } Debt.

On motion of plaintiffs, by N. M. Broadwell, esq., their attorney, leave is granted to amend declaration. And now the said defendants, Oliver Holmes, Thomas L. Cooper, William Shaffer, A. T. Forth, Edward Bonham, A. B. Rider, L. I. Rider, John L. Handley, John A. Moffett, John Keen, jr., A. M. Funkhouser, C. C. Boggs, William W. George, James McCartney, J. G. Crews, D. W Barkley, T. A. Martin, N. E. Roberts, O. W. Harvey, John I. Farmer, J. V. Baugh, John R. Carter, Lafayette Butler, C. W. Summers, Jacob Hall, and Fred. Bestow, having been regularly served with process, are ruled to plead herein by the 23d day of January inst.

And afterwards, to wit, on the 23d day of January, in the year aforesaid, came said defendants by their attorneys and filed in said clerk's office their demurrer in said cause, which said demurrer is in the
18 words and figures following, to wit:

Demurrer.

Circuit court of the U. S., southern dist. of Illinois:

UNITED STATES OF AMERICA,
State of Illinois, ss:

JOHN W. KENNICOTT ET AL.
vs.
OLIVER HOLMES ET AL. } Debt.

And now come the County of Wayne, impleaded by name and style of Board of Supervisors of Wayne County, and Thomas L. Cooper, Oliver Holmes, William Shaeffer, Robert T. Forth, Edward Bonham, Alexis B. Rider, Louis J. Rider, John L. Handley, John A. Moffett, John Keen, jr., Alexander M. Funkhouser, Carrol C. Boggs, William W. George, Joseph G. Crews, David W. Barkley, Thomas A. Martin, Nathan E. Roberts, Oscar W. Harvey, John I. Farmer, Joel V. Baugh, John R. Carter, Lafayette Butler, Caleb W. Summers, Jacob Hall, and Fred. Bestow, defendants herein, by Edwin Beecher, H. Tompkins, C. C.

Boggs, and A. M. Funkhouser, their attorneys, and say that the plaintiff's declaration herein filed against them is insufficient in law.

And for other and special causes of demurrer defendants aforesaid say that said declaration is insufficient, because, they say:

19 1st. That there is no averment in said declaration that the Supreme Court of the United States rendered any judgment or decree Interest. against the county of Wayne, or Board of Supervisors of Wayne County, on the affirmance of said decree for $40,000 for interest accrued on said decree during the pendency of said appeal.

2nd. There is no averment that said Supreme Court on the affirmance of said decree rendered any judgment or decree or awarded any dam- Unpaid decree. ages against said county of Wayne, or its board of supervisors, for $200,000, or any portion of said decree remaining unsatisfied after sale of the lands ordered by said decree.

3rd. There is no averment that said Supreme Court on the affirmance of said decree rendered any judgment or decree or assessed any dam- Depreciation. ages against said county of Wayne, or its board of supervisors, for $50,000 depreciation in the value of said lands since & during the pendency of said appeal.

4th. There is no averment that said Supreme Court on the affirmance of said decree rendered any judgment or decree or assessed any dam- Attorneys' fee. ages against said county of Wayne, or its board of supervisors, for $25,000 attorneys' fees for attending to said appeal.

20 5th. There is no averment that said Supreme Court on the affirmance of said decree rendered any judgment or decree or assessed any damages against said county of Wayne, or it board of supervisors, for $50,000 taxes on said lands during the pendency of said appeal.

6th. There is no averment that said Supreme Court on the affirmance Damages. of the said decree rendered any judgment or decree or assessed any damages against said county of Wayne, or its board of supervisors, for any sum as damages.

Against what. 7th. That the bond declared upon by plaintiffs does not in its legal effect bind the defendants, or any of them, for the payment of any part of the original decree appealed from, nor for the payment of any interest thereon, nor for any loss by depreciation of the real estate involved in the decree appealed from.

8th. That said bond declared on herein by its legal effect does not bind the defendants for the payment of any attorney's fee expended by Attorneys' fees. plaintiffs for attending said appeal, nor is there any averment that plaintiffs have ever paid any sum whatever as attorney's fees.

21 9th. That the bond declared does not by its legal effect bind the defendants to refund any taxes paid by plaintiffs on the lands involved in the decree, nor does the declaration aver that plaintiffs have paid any taxes.

And for other good and sufficient causes defendants aforesaid say that said declaration is insufficient in law.

EDWIN BEECHER,
H. TOMPKINS,
A. M. FUNKHOUSER,
C. C. BOGGS,
Att'ys for said Defendants.

(Endorsed:) Filed January 23d. 1878. J. A. Jones, clerk.

And afterwards, to wit, on Tuesday, the 14th day of May, at the term and in the year last aforesaid, the following further proceedings were had in said court, in said entitled cause, and entered of record, to wit:

22 *Judgment.*

JOHN W. KENNICOTT, JOSEPH W. WARD, Andrew H. Ward, Ebenezer W. Stone; Catherine Earle and Abraham Riker, executors of Morris J. Earle, deceased; Francis E. Parker and William B. Bacon, administrators, etc., and Eliza A. Wakefield, administratrix of Cyrus Wakefield, deceased; J. Sargent Smith, Thomas Upton; Maria Myers, administratrix of Austin Myers, deceased; Thomas Upton, executor of John W. Emerson, deceased; John H. Brown, Henry V. Davis, William R. Hodges, John L. Priest, William C. Plunkett, John J. Dixwell, Joseph Smith, Arthur F. Gould, Joseph Burnett, and William L. Ralston, plaintiffs, who sue for the use of themselves and of Roxanna Crego, Richard P. Glen, James S. Hendrickson, Oliver D. Taylor, L. F. Reed, Clark L. Potter, Joseph Maxeibaum, James Q. Faircloth, Caleb Underhill, William C. Potter, Thomas E. F. Randolph, Hosea Birdsall, James F. Hendrickson, & Benjamin Hise,

vs.

OLIVER HOLMES, THOMAS L. COOPER, William Shaffer, R. T. Forth, Edward Bonham, A. B. Rider, L. I. Rider, John L. Handley, John A. Moffitt, John Keen, jr., A. M. Funkhouser, C. C. Boggs, William W. George, James McCartney, J. G. Crews, D. W. Barkley, T. A. Martin, N. E. Roberts, O. W. Harvey, John I. Farmer, J. V. Baugh, John R. Carter, Lafayette Butler, C. W. Summers, Jacob Hall, and Fred Bestow, & the board of supervisors of Wayne County, Illinois, impleaded with Daniel L. McCawley, O. P. Patterson, G. J. George, D. C. Graves, Francis Kelly, T. J. Mayers, John D. Simpson, N. N. Borah, William Halloway, E. W. Mabry, W. C. Kennerly, Moses Rentrow, Thomas J. Butler, Stephen Fils, James M. Butler, M. B. Kennerly, Daniel Talkington, J. E. Kinnerly, D. K. Felix, John Felix, William J. Vaughan, Samuel Berry, Marion T. Berry, A. W. Womack, C. Walter, I. M. Hawes, M. R. Whitson, Henderson Gridewell, Aaron B. Miller, George W. Ritcher, Caleb Crews, John Harvey, T. W. Dickey, B. F. Harris, John Walton, A. G. Borah, J. C. Staton, John W. Cissna, H. M. Twadell, George T. Lawrence, William H. Grant, James B. Manahan, M. M. Wheeler, H. B. Johnson, William Pasco, William Stephens, Jacob Mather, William R. Barr, William H. Stephens, George George, G. Feather, E. J. Miller, James W. McBill, C. M. Williams, and Robert P. Hanna. } Debt.

23

And now on this 14th day of May, A. D. 1878, come as well the plaintiffs, by their attorneys, J. A. McClernand & N. M. Broadwell, as
24 the following named defendants, to wit: the board of supervisors of Wayne County, Illinois, Thomas L. Cooper, Oliver Holmes, William Shaffer, John L. Handley, John A. Moffett, John Keen, jr., A. M. Funkhouser, C. C. Boggs, William W. George, James McCartney, Jo. G. Crews, D. W. Barkley, T. A. Martin, N. E. Roberts, O. W. Harvey, R. T. Forth, John I. Farmer, Joel V. Baugh, Edward Bonham, L. J. Rider, A. B. Rider, John R. Carter, Lafayette Butler, Fred. Bestow, C. W. Summers, and Jacob Hall, by their attorneys, E. Beecher & C. C. Boggs, and as well the said plaintiffs as the said defendants, so coming, submit this cause to the court for trial by the same, without the intervention of a jury; and the court having heard their proofs and allegations, and the argument of counsel, and now being sufficiently advised in the premises, doth find the issue in favor of the plaintiffs for the use aforesaid, and that the plaintiffs have sustained damage to the same use to the amount of forty thousand dollars. And it is, therefore, ordered and adjudged by the court that the plaintiffs recover of the said defendants, the said board of supervisors of Wayne County, Illinois, Thomas L. Cooper, Oliver Holmes, William Shaffer, John L. Handley, John A. Moffet, John Keen, jr., A. M. Funkhouser, C. C. Boggs, William W. George, James McCourtney, Jo. G. Crews, D. W. Barkley, T. A. Martin, M. E. Roberts, O. W. Harvey, R. T. Forth,
25 John I. Farmer, Joel V. Baugh, Edward Bonham, L. J. Rider, A. B. Rider, John R. Carter, Lafayette Butler, Fred. Bestow, C. W. Summers, and Jacob Hall, for the use aforesaid, the sum of forty thousand dollars for the debt of the said plaintiffs above in their declaration demanded, and also the further sum of forty thousand dollars for the detention thereof, as damages by the court assessed for the use aforesaid, and also their costs in this behalf expended, and that they have execution therefor, for the use aforesaid, against the said defendants other than the said board of supervisors of Wayne County, Illinois. And the court doth further order and adjudge that the payment of the said damages and costs shall be in full satisfaction and discharge of this judgment.

And afterwards, to wit, on Monday, the 20th day of May, at the term and in the year last aforesaid, the following further proceedings were had in the said court in the said cause and entered of record, to wit:

Motion for new trial.

JOHN W. KENNICOTT ET AL. vs. OLIVER HOLMES ET AL. } Debt.

This day come the defendants, by Edwin Beecher, esq., their attorney, and enter their motion for a new trial herein.

26 And afterwards, to wit, on the 26th day of June, in the year last aforesaid, came said defendant, James McCartney, by his attorney, and filed in said clerk's office his motion for a new trial in said cause, which said motion is in the words and figures following, to wit:

McCartney's motion for a new trial.

In circuit court United States, southern district of Illinois. June term, 1878.

JOHN W. KENNICOTT ET AL.
vs.
THE COUNTY OF WAYNE ET AL. } Debt on appeal bond.

And now comes the def't, James McCartney, by his att'y, H. Tompkins, and moves the court to set aside the judgment rendered and to grant a new trial.

And as grounds for the motion the defendant shows to the court the following, to wit:

That he filed his plea in his own proper person in the said cause on the 9th day of January, 1878; that the att'ys for other defendants in the cause signed a stipulation, and submitted the same to a decision of the court without disposing of his said plea, and on which stipulation so submitted to the court the court rendered a judgment him without there being any issue made on his plea to the pl'ff's declaration.

27 That he had no part in making the said stipulation, or submitting the same to the court, on which the said judgment has been rendered against him in this cause.

That the said stipulation admits facts as being true for the plaintiffs which are not true in fact, which have contributed to rendering the judgment against the defendants, in this, that the stipulation "that a sale and confirmation had been had" of the lands described in the said decree to be sold to satisfy the demand against the defendants, when the records of the court do not show any sale or confirmation, and the facts, when shown, will prove that there has been no sale.

That there is a good substantial defense against the demand of pl'ffs on trial of the issue of the pl't'ff's declaration and def'ts plea.

That the judgment is contrary to the law and the evidence in the case.

A. TOMPKINS,
Att'y for Def't, James McCartney.

(Endorsed:) Filed June 26, 1878. J. A. Jones, clerk.

And afterwards, to wit, on said 26th day of June, in the year aforesaid, came said defendant, J. L. Handley, by his attorney, and filed in said clerk's office his motion for a new trial in said cause, which
28 said motion for a new trial is in the words and figures following, to wit:

Handley's motion for a new trial.

In circuit court United States, southern district of Illinois.

JOHN W. KENNICOTT ET AL.
vs.
THE COUNTY OF WAYNE ET AL. } Debt on appeal bond.

Motion for new trial.

And now comes the defendant, J. L. Handley, by his attorney, H. Tompkins, and moves the court to set aside the judgment rendered, and to grant a new trial in this cause.

And as grounds for the motion the defendants show to the court by affidavit the following, to wit:

First. That the court admitted improper evidence by stipulation, as follows: "It is further agreed, that so far as the right of recovery in this case is concerned, it shall be deemed and considered that a sale of the lands in the decree described had been made approved by the court before the commencement of this suit, and that the lands in the decree and mortgage and trust deed mentioned did not bring enough at said sale to satisfy and pay the amount due the complainants under the decree as holders of the bonds of said railroad company, by an
29 amount largely over the amount of the appeal bond in this case sued on; and that the interest at the legal rate, on the aggregate amount of the bonds of the railroad company found due the complainants, and established by said decree, would amount to a sum largely exceeding the amount of said appeal bond in this cause sued on." Which stipulation was made, filed and disposed of to a judgment against defendants, without the consent, approval, or knowledge of the defendants or their attorney, and in derogation of their rights, and to the prejudice of the defence in the cause.

Second. That the court admitted a stipulation changing the issue, and set the time for hearing without disposing of the demurrer, and without notice to the defendant's attorney.

Third. That the stipulation for an issue based on a false statement of facts to the prejudice of the defence, and setting the cause for hearing without notice to defendants or attorney, is a surprise.

Fourth. That the stipulation is prejudicial to defendant's rights, in that it bars the defendants from showing that the plaintiffs acquired all that the decree or order of the court gave them by their bid at the sale, and permits the plaintiffs by their suppressed act to fix a base from which they can measure damage after the liability of the defendants has been discharged.

30 Fifth. That the stipulation bars the defendants from showing that the only bid had at the sale was made by plaintiffs, and that they acquired all, by the order of the court and their bid, that the decree gave them, and that without fault of defendants there is an adverse title to plaintiff's claim to the lands, and that there is no value to their decree and judicial sale on which damages could be assessed in this cause.

Sixth. In admitting evidence by stipulation of a fact that should appear of record, which is not true, as a base of this action.

Seventh. That the judgment is contrary to the law and the evidence in the case.

Eighth. The stipulation is double in its effect, it admits improper evidence, and debars the defendants from introducing material evidence for the defence.

H. TOMPKINS,
Att'y for Def't J. L. Handley et al.

(Endorsed:) Filed June 26, 1878. J. A. Jones, clerk.

31 And afterwards, to wit: on the 5th day of July, at the June term of said court, in the year last aforesaid, the following further proceedings were had in said court in said cause, and entered of record, to wit:

Order overruling motion for new trial.

JOHN W. KENNICOTT ET AL.
vs.
THE BOARD OF SUPERVISORS ET AL. } In debt.

And now on this 5th day of July, 1878, come the parties by their counsel, and submit to the court the motions of the defendants, John L. Handley and James McCartney, for a new trial in this cause, and also the like motion of the other defendants for a new trial; and the court having heard the proofs and allegations of the parties, and being sufficiently advised in the premises, doth order and adjudge that a new trial herein be granted to the defendants, John L. Handley and James McCartney; and that the motion of the other defendants for a new trial be overruled.

And then afterwards, to wit: on Monday, the 8th day of July, at the term and in the year last aforesaid, the following further proceedings were had in said court, in said cause, and entered of record, to wit:

32 *Motion in arrest of judgment.*

JOHN W. KENNICOTT ET AL.
vs.
OLIVER HOLMES ET AL. } In debt.

And the said defendants, except James McCartney and John L. Handley, come and move the court in arrest of judgment in this cause for the following causes:

1st. This is a joint action and a new trial has been granted as to the said defendants McCartney and Handley. No judgment can be entered against part of the defendants until the issues are disposed as to all. And said record is otherwise informal.

And afterwards, to wit: on Wednesday, the 24th day of July, at the term and in the year last aforesaid, the following further proceedings were had in said court, in said entitled cause, and entered of record, to wit:

Order overruling motion in arrest of judgment.

JOHN W. KENNICOTT ET AL.
vs.
OLIVER HOLMES ET AL. } In debt.

And now on this 24th day of July, 1878, come again the parties, and submit to the court the motion heretofore entered by the defendants in arrest of judgment; and the court having heard and considered the same, and being sufficiently advised in the premises, doth order
33 and adjudge that said motion be overruled; and thereupon the plaintiffs discontinue this suit as against the defendants James McCartney and John L. Handley. And that the plaintiffs pay the costs of said defendants McCartney and Handley, in this behalf expended to be taxed, &c.

And afterwards, to wit, on the 26th day of July, in the year last

aforesaid, came said defendants by their attorneys and filed in said court their motion to discontinue said cause, which said motion is in the words and figures following, to wit:

Motion to discontinue.

In the circuit court of the United States, southern district of Illinois.

JOHN W. KENNICOTT ET AL.
vs.
OLIVER HOLMES ET AL. } Debt on appeal bond.

Now at this day come the said defendants against whom verdict has been found, and move the court to discontinue this cause, and in arrest of judgment on the finding of the court herein. And for causes therefor said defendants assign the following:

1st. The plaintiffs had no authority to dismiss as to part of said def'ts without dismissing as to all.

2. No judgment can be entered as to part of said defendants without its being against all served.

C. C. BOGGS,
E. BEECHER,
For Def'ts.

34 (Endorsed:) Filed July 26th, A. D. 1878. J. A. Jones, clerk.

And afterwards, to wit, on Friday the 26th day of July aforesaid, at the term and in the year last mentioned, the following further proceedings were had in said court in said entitled cause and entered of record, to wit:

Order overruling motion to discontinue & allowing appeal.

JOHN W. KENNICOTT ET AT.
vs.
OLIVER HOLMES ET AL. } In debt.

And now on this 26th day of July, 1878, come again the parties by their counsel and submit to the court the motion this day filed by the defendants to discontinue this cause, which motion being heard and considered by the court is overruled; and thereupon on motion of the defendants it is ordered by the court that a writ of error to the Supreme Court of the United States to operate as a supersedeas be allowed to the defendants, or any of them, on their entering into bond to the plaintiffs in the penalty of $50,000.00, conditioned as the court directs, with security to be approved by the clerk of this court within sixty days from the 26th day of July, 1878, that being considered as the true date of the final judgment in this cause, and thereupon the
35 defendants tendered their bill of exceptions which is signed, sealed, & made part of the record in this cause.

Bill of exceptions.

Circuit court of the United States, southern district of Illinois.

JOHN W. KENNICOTT ET AL.
vs.
OLIVER HOLMES ET AL. } Debt on appeal bond.

Be it remembered that on the trial of this cause, to wit, on the 14th

day of May, 1878, the same having been by the parties submitted to the court, Judge Treat, without the intervention of a jury upon an agreed statement in writing in words and figures following, viz:

Agreement as to facts on submitting cause.

In the circuit court of the U. S. for the southern district of Illinois.

JOHN W. KENNICOTT ET AL.
vs.
HOLMES ET AL.
} Debt on appeal bond.

It is hereby agreed that this cause shall be submitted to Judge Treat and Drummond on the following agreed state of facts, viz: That the bond in this suit was given by Wayne County as principal and
36 the other defendants as securities as the appeal bond for the county of Wayne in the case of Kennicott et al. vs. The Board of Supervisors of Wayne County, Illinois, impleaded with Mount Vernon Railroad Company, which case was a suit in chancery in this court to foreclose a mortgage and trust deed executed by said Wayne County to a trustee, one Seymour, which mortgage will be found on page 51 and the trust-deed on page 65 of the printed record of said chancery cause of Kennicott et al. vs. Wayne County impleaded in the Supreme Court of the U. S., both of which instruments are made part of this agreement (and are hereafter in this bill of exceptions marked respectively Exhibits A & B). That said foreclosure suit was heard in the U. S. circuit court and an interlocutory decree rendered, which will be found on page 195 of said printed transcript of said cause, and a final decree which will be found on page 360 of same printed transcript, both of which decrees are hereby made part of this agreement (and are hereafter in this bill of exceptions marked respectively Exhibits E & D). The copies of the bonds of the Mount Vernon Railroad in said printed transcript which in said decree are declared to be liens on the lands in said trust-deed and mortgage mentioned are also made a part of
37 this agreement (and are hereafter in this bill of exceptions marked as Exhibit C) That from said decree Wayne County appealed to the U. S. Supreme Court and executed the bond in the sum of $40,000.00 on which this suit is based. That said appeal bond was filed and appeared as an appeal bond by this court on the 21st day of August, A. D. 1874, and that said appeal was pending in the Supreme Court until April, 1877, when the decree was affirmed, which said affirmance and the order thereof are made part hereof (and is in this bill of exceptions hereafter marked Exhibit F).

It is further agreed, that so far as the right of recovery in this case is concerned, it shall be deemed and considered that a sale of the lands in the decree described had been made and approved by the court before the commencement of this suit, and that the lands in the decree and mortgage and trust deed mentioned did not bring enough at said sale to satisfy and pay the amount due the complainant under the decree as holders of the bonds of said railroad company by an amount largely over the amount of the appeal bond in this cause sued on, and that the interest at the legal rate on the aggregate amount of the bonds of the railroad company found due the complainants as
38 established by the decree during the pendency of said appeal would amount to a sum largely exceeding the amount of said appeal bond in this cause sued on.

On this state of facts the case is submitted for trial, and both parties are to be allowed to file briefs and arguments, and to each party is reserved the right to appeal to the Supreme Court from any judgment rendered hereon; but in the event that Judge Drummond does not attend this court in time to take part in the hearing of this cause, then the same shall be heard and determined by Judge Treat alone. Defendants withdraw their demurrer herein, and it is agreed that pleas proper in such case are on file.

E. BEECHER,
Att'y for sureties on appeal bond.
C. C. BOGGS,
Att'y for Wayne County, Ills.
McCLERNAND,
Att'y for Pl'ffs.
N. M. BROADWELL,
Att'y for Pl'ffs.

Unless said cause shall be heard and determined at the present of this circuit court, then the foregoing stipulation to be null.

McCLERNAND,
Att'y for Plaintiff.
C. C. BOGGS,
Att'y for Wayne County.

It was admitted by plaintiffs in open court during the hearing of the cause, that the costs adjudged against said defendant, Wayne
39 County, Illinois, in the Supreme Court on the trial of the cause for which the appeal bond sued on in this cause was given, had been paid by said defendants before the commencement of this suit. The said mortgage, deed of trust, railroad bonds, interlocutory decree, and final decree and order of affirmance by Supreme Court, hereinafter appearing, marked severally exhibit A, B, C, D, E, & F, are taken as part of this bill of exceptions, and together with the said agreement and the admission of plaintiffs as to the payment of the costs in the supreme court constitute and was all the evidence in the case.

After hearing argument, the court, on the 14th day of May, 1878, found for plaintiffs $40,000.00 debt, being the penalty of the appeal bond sued on, and $40,000.00 damages, to be discharged on payment of the damages, to which finding and decision of the court the defendants, except John L. Handley and James McCartney, then and there excepted, and moved the court for a new trial, for the reasons that the finding of the court was contrary to law and evidence, and that the finding should have been for the defendants, which motion was, on the 5th of
40 July, 1878, overruled, and defendants then and there excepted, and the said James McCartney and John L. Handley on the said finding of the court filed their motion for a new trial, which was by the court on the 5th of July, 1878, allowed, and afterwards, to wit, on the 8th day of July, 1878, the defendants, except Handley and McCartney, entered their motion in arrest of judgment in words and figures following:

Motion in arrest of judgment.

Circiut court of the United States, southern district of Illinois.—June term, A. D. 1878.

JOHN W. KENNICOTT ET AL.
vs.
OLIVER HOLMES ET AL. } Debt on appeal bond.

And the said defendants, except James McCartney and John L. Handley, come and move the court in arrest of judgment in this cause for the following causes:

1st. This is a joint action, and a new trial has been granted as to the said defendants McCartney and Handley. No judgment can be entered against part of the defendants until the issues are disposed of as to all. And said record is otherwise informal.

BOGGS & BEECHER,
Atty's for Def'ts.

(Indorsed:) Filed July 8, 1878. J. A. JONES, *Clerk.*

41 Which said motion was on the 24th day of July, 1878, overruled by the court, and the defendants making said motion then and there excepted.

And afterwards, to wit, on the 26th day of July, 1878, the said defendants, except Handley and McCartney, filed their motion to discontinue this cause in words and figures following, to wit:

Motion to discontinue.

In the circuit court of the United States, southern district of Illinois.

JOHN W. KENNICOTT ET AL.
vs.
OLIVER HOLMES ET AL. } Debt on appeal bond.

Now at this day come the said defendants against whom verdict has been found, and move the court to discontinue this cause, and in arrest of judgment on the finding of the court herein, and for causes therefor, said defendants assign the following:

1st. The plaintiff had no authority to dismiss as to part of said defendants without dismissing as to all.

2nd. No judgment can be entered as to part of said defendants without its being against all served.

C. C. BOGGS &
E. BEECHER,
For Def't's.

(Indorsed): Filed July 26th, A. D. 1878. J. A. Jones, clerk.

42 Which said last-named motion was on the date last aforesaid overruled by the court, and the defendants making said motion then and there excepted, and the court then, to wit, on the said 26th day of July, 1878, rendered a final judgment against defendants served with process, except McCartney and Handley, for the sum of $40,000.00 debt, being the penalty of said appeal bond sued on, and $40,000.00

damages to be discharged on the payment of $40.000.00, the damages aforesaid, together with costs of the suit. To the rendition of such judgment said defendants, by their counsel, then and there excepted. To all of which several decisions and rulings of the court in finding for the plaintiffs, in granting a new trial to part of the defendants and overruling defendants' motion for a new trial, and motions in arrest of judgment, and for a discontinuance of the cause, and in rendering final judgment against defendants (except McCartney and Handley), defendants at the time of the rendition of such decisions and ruling by the court then and there excepted.

Copy of mortgage—Exhibit A.

This indenture made this twentieth day of April, in the year of our Lord one thousand eight hundred and fifty-nine, between Samuel
43 J. R. Wilson, judge, and Thomas M. Scott, associate judge, of the county court of the county of Wayne, in the State of Illinois, parties of the first part, and Isaac Seymour, of the city and State of New York, banker, trustee, as hereinafter mentioned, party of the second part, witnesseth:

Whereas the Congress of the United States duly passed an act approved September 28th, one thousand eight hundred and fifty nine, entitled "An act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits, and in pursuance thereof the Secretary of the United States caused a patent to be issued to the State of Illinois for all the swamp and overflowed lands within its limits, to be located under the direction of the Commissioner of the Land Office; and whereas the legislature of the said State of Illinois passed an act approved by the governor of said State on the twenty-second day of January, one thousand eight hundred and fifty two, entitled "An act to dispose of the swamp and overflowed lands and to pay the expenses of selecting and surveying the same;" which said act authorized the appropriation and disposal of said lands for such purposes as may be decreed expedient by the court or county judge; and whereas the legislature of the said State of Illinois passed an act approved by the governor of said State, on the fifteenth day of February, one thousand
44 eight hundred and fifty-five, entitled "An act to incorporate the Mount Vernon Railroad Company," whereby all such persons and corporations as shall become stockholders under the provisions of the said act and their successors were duly incorporated into a body politic and corporate, under the name of The Mount Vernon Railroad Company; and the parties of the first part were duly authorized and empowered to make such disposition of the swamp and overflowed lands within the said county of Wayne in aid of the construction and maintenance of the said railroad as they deem best for the public interest of said county; and whereas at a special term of the said county court of the county of Wayne, held on the 28th day of September, one thousand eight hundred and fifty five, an order was duly made and entered by the same court, whereby a special election was ordered and directed on the fifth day of November, one thousand eight hundred and fifty-five, to be held for the purpose of taking the sense of the qualified voters of the county upon the mortgaging that portion of the said overflowed and swamp lands hereinafter described, for the purpose of aiding in the construction and maintenance of the said
45 Mount Vernon Railroad; and the said county court did then and there order public notice of such special election to be given

by advertisements in accordance with the statue laws of said State of Illinois, which said notice was given and published in conformity with the terms and provision of said order; and the county court did prepare a proposition containing a brief, clear, and distinct idea of the plan proposed by them for aiding in constructing said road; and did cause the said propositions to be duly printed at large as an election ticket, and presented to the said qualified voters of said county, to be used at such election in the words and figures following, to wit: "For appropriating the swamp lands of Wayne County as a bonus to any company for building a railroad through said county." "Against the same." And the said special election was duly held pursuant to said notice on the said fifth day of November, one thousand eight hundred and fifty-five, and conducted in all things in conformity to the provisions of said charter and the laws of said State of Illinois, and the returns thereof made, canvassed and published in all respects as other county elections are required to be in and by the said laws. And whereas the said proposition or plan above stated received the highest number of votes and
46 a majority of all the votes given at such election, and a majority of the qualified voters of the said county of Wayne expressed their will by writing and voting "yea" upon the said several printed propositions or tickets cast by them at the said election; and whereas upon the returns of said special election being duly made, canvassed and published as aforesaid, the county court of the county of Wayne did adopt the proposition or plan having the highest number of votes as aforesaid, and did order and adjudge and determine to execute a mortgage in conformity to such proposition or plan and to the provision of this instrument to the parties of the second part as trustee upon the land hereinafter described for the purpose of aiding in the construction and maintenance of the said Mount Vernon Railroad, which said order was duly made in open court on the twentieth day of April, one thousand eight hundred and fifty-nine; and whereas by virtue of the said several acts and proceedings the parties of the first part have become endowed with the requisite power and authority to dispose of and mortgage the said lands for the purpose of aiding the construction and maintenance of the railroad of the said Mount Vernon
47 Railroad Company, and the said parties deem it best for the public interest of the said county of Wayne that the lands hereinafter described should be mortgaged to the party of the second part, trustee and commissioner duly appointed and selected by both the said parties of the first part and the said Mount Vernon Railroad Company upon the terms and conditions particularly set forth; and whereas the said Mount Vernon Railroad Company has deemed it advisable to provide for the issue and disposal, now and hereafter, of its construction bonds, for the purpose of raising funds from time to time for the construction and completing of the railroad and for the equipment thereof, and the expenses of organizing and operating the same, and thereby to become indebted to divers persons, bodies politic or corporate, who shall become holders of such construction bonds and obligations in the just and full sum, in the aggregate, of eight hundred thousand dollars secured to be paid by their four hundred construction bonds or obligations of and for five hundred each, and by their six hundred construction bonds or obligations of and for one thousand dollars each, to the extent of eight hundred thousand dollars in the aggregate, to bear date
48 on the first day of , one thousand eight hundred and fifty-nine, and be payable in fifteen years from the date thereof, which will be in the year one thousand eight hundred and seventy-four, at the Bank

of North America in the city of New York, with interest at the rate of seven per centum per annum, payable semi-annually at the Bank of North America in said city of New York, on the first day of May and November in each year, to be secured hereby, all which bonds are to have warrants for the payments of the interest thereon, attached and to be in the form following, the respective numbers and amounts thereof being omitted:

"The Mount Vernon Railroad Company acknowledges itself to owe Isaac Seymour or bearer one thousand dollars, which said company hereby promises to pay on presentation of this bond hereof at the Bank of North America in the city of New York on the first day of May, one thousand eight hundred and seventy-four, with interest thereon at the rate of seven per cent. per annum semi-annually on the first day of May and November in each year until the said principal sum shall be paid, on presentation of the proper interest warrants hereto an-
49 nexed at the said Bank of North America. This bond is one of a series of four hundred of five hundred dollars each, and six hundred of one thousand each of like term and date, not exceeding in the whole the sum of eight hundred thousand dollars, issued and to be issued for the purpose of the construction and completion of the said railroad and the expenses incident thereto. Full payment of the principal and interest of the whole issue of these bonds is secured by a mortgage bearing even date herewith to the said Isaac Seymour of the city of New York as trustee, of one hundred thousand acres of land in the county of Wayne in the State of Illinois, granted by the said State and county for the purpose of constructing and maintaining said railroad, and also by a mortgage to said Isaac Seymour as trustee of said railroad, its branches, and other real and personal property of said company.

"In witness whereof the said Mount Vernon Railroad Company has caused this bond to be executed and attested in its behalf by its president and treasurer, and its interest warrants to be signed by its secretary and its corporate seal to be hereto affixed at the in the State of this day of one thousand eight hundred and fifty-nine."

50 Which said construction bonds or obligations are primarily secured by this indenture and the lands herein described, and the avails thereof are to constitute a primary fund for the payment of the principal and interest of the said bonds.

Now, therefore, this indenture witnesseth, that the said parties of the first part in consideration of the premises and of one dollar to them severally paid by the parties of the second part at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, remised, released, conveyed, and confirmed, and by these presents do grant, bargain, sell, remise, release in full of, convey and confirm to the party of the second part, his successors and the survivors of them, and the heirs and assigns of such survivors forever, all and singular the land and premises situate and lying and being in the county of Wayne and State of Illinois, bounded and described as follows, that is to say: Northeast quarter, southwest quarter, southeast of northwest quarter, all in section three, township one south, range five east. (The description of the remainder of the land in said mortgage is omitted by agreement of the parties.)

51 To have and to hold all and singular the lands and premises hereby granted or intended so to be, and each and every part and parcel thereof, with the appurtenances, unto the said party hereto of the

second part, his successors and assigns forever, as joint tenants and not as tenants in common, for the uses and purposes in this indenture set forth and declared, and subject to the provisions and requirements of the beforementioned act of Congress of the United States and the act passed by the legislature of the State of Illinois, incorporating the said Mount Vernon Railroad Company, and subject also to the possession, control, and management of the party of the second part so long as said construction-bonds or obligations shall remain unforfeited by the proper performance of all the stipulations thereof; provided always, and these presents are upon the express conditions, that if the said Mount Vernon Railroad Company shall well and truly pay or cause to be paid to the holders of the said construction bonds or obligations, and every of them, the principal sum of money therein mentioned according to the true intent and meaning thereof, with the interest thereon at the times and in the manner as hereinbefore provided according to the true intent
52 and meaning of these presents, that then and from thence'orth this indenture and the estate hereby granted shall cease and be utterly void.

And this indenture further witnesseth that these presents are made, executed and delivered upon the terms, conditions and agreements following, that is to say: the said party of the second part, shall and will cancel and discharge every construction-bond or obligation and the interest warrants therein, which he may receive in payment for land and as part or the whole consideration of each deed or sale by defacing the seal of the corporation in receipt whereof, and will make or cause to be made in or upon the face thereof a note or memorandum with proper description of the land sold and conveyed with the date of the conveyance for which the same has been received and canceled in such manner and form as will enable the parties of the first part to trace and follow the appropriations of all the said construction bonds. That the said party of the second part shall and will set forth and declare in each and every deed of conveyance the true amount of the purchase money of the land and premises conveyed or intended to be conveyed
53 thereby and the part thereof for which a bond or bonds may have been received with the number and amount thereof; and also the sum actually paid in cash for the residue and remainder of said purchase money; and also whenever a bond or bonds exceeding the amount of the purchase money may have been received in payment thereof the amount in cash actually refunded to the purchaser or holder of such bond or bonds for such excess. That the interest warrants of said construction bonds or obligations becoming due and payable during the progress of the work of constructing and up to inclusive of the warrants for the semi-annual interest becoming due and payable next after the completion and actual use of the main railroad and branches, shall be paid from and out of the proceeds and avails of the said construction bonds or obligations as part of the cost of said road and branches, but that all interest-warrants becoming due and payable thereafter when the said railroad and branches shall be put in operation shall be paid from and out of the receipts and income from the use and operation of the road and branches unless the same be inad-
54 equate thereto in which case any unpaid balance of the same shall be paid from the proceeds and avails of the said bonds. That the said party of the second part shall and will cede, set aside and preserve all interest fund, as further and collateral security, for the punctual payment of all the interest-warrants of the said construction-bonds or obligations at the time when the same severally becomes due and payable,

by the appropriation of the proceeds of sales of twenty thousand acres of the lands above described, set aside for this purpose and held by the said trustee free from incumbrance. That the said party of the second part shall and will manage and invest the interest fund in such manner as will render the same at all times readily convertible into cash to prevent any delay in the payment of the interest should the provisions heretofore made and declared be at any time inadequate for that purpose, and for the payment of any deficiency will use and appropriate the said interest-fund in following manner: first, the current interest of the interest-fund; second, the proceeds of the sales of the above-described lands.

And this indenture further witnesseth that the said parties of the
55 first part for themselves and their successors, do covenant and agree that if default shall be made in the payment of the interest upon the said construction bonds or obligations, so that a sum equal to one year's interest of the whole amount of the said construction bonds or obligations already issued and secured by these presents, or that if default shall be made in the payment of the principal of said construction bonds or obligations, that then and from thenceforth it shall and may be lawful for the said parties of the second part to enter into and upon, and take possession of all and singular the lands and all the premises included or intended to be included in this mortgage; and further that the said party of the part having entered into full possession of all and singular the lands hereinbefore particularly set forth and described remaining unsold at the time of such entry, if any there be, may proceed to sell and dispose of the same, or so much thereof as shall be necessary for the purpose of paying said principal and interest, and may make such sales of the said premises, each and every of them, and all benefit and equity of redemption of the said parties of the first
56 part therein, at public auction, giving reasonable and public notice of the time and place of said sale in the public newspapers of the State of Illinois, published at Chicago and Springfield, and in two public newspapers of the city of New York; and as the attorney of the said parties of the first part for that purpose by these presents duly authorized, constituted, and appointed to make and deliver to the purchaser or purchasers thereof a good and sufficient deed or deeds of conveyance in fee simple, and out of the moneys arising from such sale and sales to retain the principal and interest which shall then be due on said construction bonds or obligations for the benefit of the holders thereof, together with the cost and charges of advertisement and sale of the said premises, rendering the overplus of the purchase money (if any there shall be) unto the Mount Vernon Railroad Company, its successors, and assigns forever, which sale shall forever be a perpetual bar, both at law and in equity, against the said parties of the first part, their successors and assigns, and all other persons claiming or to claim the premises so sold, or any part thereof, by, from or under them. And it is further provided that if after the said construction bonds or
57 obligations shall be fully paid, together with all arrears of interest thereon, there shall be any of the above described lands remaining unsold, or any of the proceeds and avails of the said bonds in the hands of the party of the second part unprovided for, then and in that case said party of the second part shall convey absolutely the said lands and shall pay, transfer, and deliver said proceeds and avails to the said Mount Vernon Railroad Company, its successors and assigns forever.

And it is here virtually agreed, by and between the parties to these

presents, that the said party of the second part, his heirs, executor, or administrator shall not be answerable for the acts, omissions, or defaults of his attorneys hereinafter referred to, and that he shall be responsible for gross negligence and willful default only.

And it is further agreed that the said parties of the first part, their successors, and all and every person or persons whomsoever lawfully or equitably deriving any estate, right, title, or interest of, in, or to the premises hereinbefore granted by, from, under, or in trust for them, shall and will at any time or times hereafter, upon the reasonable request and at the proper costs and charges in the law of the said party of the second part, his heirs and assigns, make, do, and execute, and cause to be made
58 and executed, all and every such further and other reasonable acts, conveyances, and assurances in the law for better and more effectually vesting and confirming the premises hereby granted, or intended so to be, in and to the said party of the second part, his heirs and assigns forever, as by the said party of the second part, his heirs and assigns, or his or their counsel learned in the law, shall be reasonably advised or required.

And it is further provided that the parties of the first part shall, upon the request of the party of the second part, designate and appoint a commissioner, resident of the said county of Wayne, to make and execute conveyances of said land to purchasers thereof, as herein provided, and generally to carry into effect the provisions hereof; and that the said party of the second part may execute and deliver the power of attorney to such commissioner, authorizing and empowering them duly to make, execute, and deliver in his behalf, as such trustee, deeds and conveyances to the purchasers of such lands as may be proper, and to do such other acts and things as may be necessary to carry into effect the provisions of this instrument, and the execution of such conveyance by the said commissioner, when so empowered by the said party of the
59 second part, shall be effectual to confirm and establish in such purchasers, respectively, all of the right, title, interest, and estate of the said party of the second part as fully, to all intents and purposes, as if the said party of the second part had personally made and executed the same.

In witness whereof the said parties of the first part have herewith set their hands and seal of the said county court the day and year first above written.

[SEAL.] S. J. R. WILSON, *Co. Judge.* [SEAL.]
THOMAS M. SCOTT. [SEAL.]

Signed, sealed, and delivered in presence of—
B. L. VORHEES.

(The certificate of acknowledgment, which is in due form, is omitted by consent of parties.)

Exhibit B.—Copy of deed of trust.

Copy of deed of trust.

This indenture, made this twentieth day of April, one thousand eight hundred and forty-nine, between Samuel J. R. Wilson, judge, and Thomas M. Scott, associate judge of the county court of the county of Wayne, and State of Illinois, parties of the first part, and Isaac Seymour, of the city of New York, banker, trustee as hereinafter mentioned, party of the second part, witnesseth:

60 (The recitales and the description of the lands conveyed are the same in the deed of trust as in the mortgage, and are omitted in this copy by agreement of the parties.)

In trust for the uses and purposes directed in said act of incorporation in the words following, that is to say: First, to secure and guarantee the constructing, completing, and furnishing said road and branches in the manner and time and upon the conditions in the act of incorporation of said company, provided for the faithful application of all money or property arising from the sale of lands, or obtained upon the faith of the same, as hereinafter authorized, to the constructing, completing, equipping, and furnishing said road and branches in accordance with the terms of said act of incorporation. Second, a portion of said lands so conveyed to said trustee, not exceeding one fourth part thereof in value, to be designated by said company, shall be held by said trustee free from encumbrances for purposes of sale from time to time on the requisition of said company for the purpose of raising funds for the payment of interest on loans in case of deficiency from other sources, and for such other expenditures as the exigencies of the business of the company may require, provided that no portion of

61 said fourth part of said lands shall be sold until said road and branches shall have been actually finished. Third, for the purpose of raising funds from time to time for the construction and completion of said road and branches, and the purchase of iron and other materials to be used therein, said company may issue its bonds, countersigned by the said trustee, in sums of not less than five hundred or more than one thousand dollars each, at rates of interest not higher than seven per centum per annum, payable semi-annually, the principal of said bonds payable in the year one thousand eight hundred and seventy-four, at such place as it shall designate. The payment of said bonds shall be secured by a mortgage of the lands, as hereinbefore provided for, which said mortgage shall be a prior lien and shall be referred to and cited in said bonds so to be issued by said company, it being understood and agreed that the said county court shall and will make, execute, and deliver to the said trustees such proper deed, conveyance, declaration of trust, or other assurance as shall from time to time be necessary and proper, and as their counsel learned in the law shall reasonably advise, for the better carrying into effect the true object of this indenture and of securing by mortgage the payment of each and

62 all of said construction-bonds in manner and form in such additional instrument to be fully and at large set forth and declared, with the same effect and certainty as if the provisions thereof had been embodied and set forth in this indenture.

To have and to hold all and singular the above granted and described premises, with the appurtenances, to the said Isaac Seymour, trustee as aforesaid, and to his successors, until all the uses and trusts hereinbefore set forth and declared shall be fully and completely accomplished, and the said trustee shall only be accountable for the exercise of reasonable diligence in the management of said trust.

In testimony whereof the said party of the first part have caused their seal to be affixed, and the president and secretary have subscribed their names the day and year first above written.

S. J. R. WILSON, *Co. Judge.*
THOMAS M. SCOTT, "

(The certificate of acknowledgment is omitted by agreement of parties.)

Exhibit C.—Copy of bond of railroad co.

Copy of bond of railroad co.

The Mount Vernon Railroad Company acknowledges itself to owe Isaac Seymour or bearer one thousand dollars, which said com-
63 pany hereby promises to pay on presentation of this bond to the holder hereof, at the Bank of North America, in the city of New York, on the first day of May, in the year one thousand eight hundred and seventy-four, with interest thereon at the rate of seven per centum per annum semi-annually, on the first day of May and November in each year, until the said principal sum shall be paid on presentation of the proper interest warrants hereto annexed, at the said Bank of North America. This bond is one of a series of six hundred of one thousand dollars each, and four hundred of five hundred dollars each, of like tenor and date, not exceeding in the whole the sum of eight hundred thousand dollars, issued and to be issued for the purpose of the construction and completion of the said railroad and the expenses incident thereto. Full payment of the principal and interest of the whole issue of these bonds is secured by a mortgage bearing even date herewith to the said Isaac Seymour, of the city of New York, as trustee of one hundred thousand acres of land in the County of Wayne, in the State of Illinois, granted by the said State and County, for the purpose of constructing and maintaining said railroad; and also, by a mortgage to said Isaac Sey-
64 mour, as trustee on said railroad, its branches, and other real and personal property of said company.

In witness whereof the said Mount Vernon Railroad Company has caused this bond to be executed and attested in its behalf by its president and treasurer, and the interest warrants to be signed by its secretary, and its corporate seal to be hereto affixed at the office of the company, in the State of Illinois, this twentieth day of April, one thousand eight hundred and fifty-nine.

[L. S.] S. CASEY, *President.*

NORMAN A. SMITH, *Treasurer.*

Exhibit D.—Copy of interlocutory decree.

Copy of interlocutory decree.

JOHN W. KENNICOTT, JOSEPH W. WARD, & others,
vs.
THE BOARD OF SUPERVISORS OF WAYNE COUNTY, Illinois, impleaded with the Mount Vernon Railroad Company. } Chancery.

This cause came on to be heard heretofore, and was submitted to the court on the pleadings and proofs therein, and on the second day of January, in the year one thousand eight hundred and seventy-one,
65 a decree was entered dismissing the complainants' bill therein with costs; and the said complainants having appealed from the said decree to the Supreme Court of the United States, and the said appeal having been argued and determined, on reading a copy of the opinion and also the mandate of the said Supreme Court, reversing the said decree on file, and remanding the cause to this court for a new trial thereof, on reading the pleadings and original and additional proofs of record

therein, and on hearing counsel, it is now at this day ordered, adjudged and decreed, and this court by virtue of the power and authority thereof, doth order, adjudge, and decree, that the mortgage and the trust deed bearing date the twentieth day of April, in the year one thousand eight hundred and fifty nine, executed in behalf of the County of Wayne, in the State of Illinois, to Isaac Seymour, of the city of New York, as trustee in the pleadings and proofs in this cause mentioned, are valid and sufficient conveyance in the law to pass and convey the lands and premises therein described to the said trustee in trust, and as security for the payment of the bonds, amounting to the sum of eight hundred thousand dollars, then issued or to be issued as con-
66 struction-bonds in aid of the Mount Vernon Railroad Company, and that the holder of such bonds in good faith and for value have a special lien upon the said lands and premises in said mortgage and in said trust deed described, for the principal and interest secured by said bonds; and it appearing by the proofs in this cause that the said Isaac Seymour, trustee, &c., departed this life before the commencement of this action without having parted without said trust and without executing the same, it is further ordered, adjudged, and decreed that Walter B. Scater, of the city of Chicago, be and he is hereby, appointed substitute trustee in lieu and stead of the said Isaac Seymour, deceased, in and for the purposes of the said mortgage and the said trust deed aforesaid, with full power and authority to look after and preserve the fund herein, subject to the directions of this court; and it further appearing that the bill in this cause is filed by the said complainants in behalf of themselves and all other bona fide holders of any of the said bonds issued as aforesaid, it is further ordered, adjudged, and decreed that it be referred to John A. Jones, esquire, the mas-
ter in chancery of this court, to ascertain and determine and
67 report what have been the reasonable and necessary expenses, counsel fees of the present complainants in and about the institution and prosecution of this suit, together with the taxable costs therein, to that time; and that thereupon the said master be, and he is hereby, directed to give public notice of sixty days by advertisement of four successive weekly insertions in the Springfield State Register and State Journal, and by twenty daily insertions in the New York Herald, requiring all bona fide holders for value of said bonds, not now parties to this suit, to appear before the said master at his office, in Springfield, on or before the day in said notice named and prove their claims; and that all such bondholders bona fide and for value be permitted so to appear and prove their claims under this decree on payment of such share of the costs, expenses, and counsel fees as may hereafter be determined by this court as conditions upon which they be allowed to submit their claims for final decree of this court; and it is further ordered and decreed that the said master be, and he hereby is, directed on the expiration of said notice to compute and ascertain the amount due to the said complainants and to such bondholders as shall have come in
68 under this decree on said notice, and proved their claims, upon the terms aforesaid, for principal and interest coupons on the bonds attached or detached held by such persons respectively; and that said master file his report of the amount so due to each, with the testimony taken by him, and the testimony already taken in the cause may be used before the said master on such reference.

Exhibit E.—Final decree, June 25, 1874.

Final decree, June 25, 1874.

JOHN W. KENNICOTT ET AL.
vs.
THE BOARD OF SUPERVISORS OF WAYNE County impleaded with the Mt. Vernon Railroad Company. } Chancery.

This cause coming on to be heard upon the equity reserved and upon the report of John A. Jones, esq., the master of this court, to whom it was referred by the interlocutory decree in this cause to compute and ascertain the amount due to the several complainants as bond-
69 holders in this cause, together with other matters in said interlocutory decree contained, and upon the exceptions filed to said report and the said court having heard all the parties in interest upon the evidence taken in said cause, and the matter contained in said report, doth now order, adjudge, and decree, that the *the* master's report be confirmed in respect to the parties hereinafter named, that is to say this court doth order, adjudge, and decree that there is due upon the bonds and interest-coupons secured by the mortgage and trust deed in the interlocutory decree in this cause mentioned, to the respective parties, complainants, and to those who have come in and taken the benefit of said interlocutory decree under the order of this court, the following sums, respectively, viz: To Maria Myers, administratrix of Austin Myers, deceased, one hundred and fifty thousand eight hundred sixty-three dollars and sixty-five cents (150,863.65); Francis E. Parker, William B. Bacon, and Elma A. Makepeace, administrators of Cyrus Wakefield, deceased, one hundred and nineteen thousand nine hundred and seventy dollars and sixty-two cents (119,970.62); John H. Brown, sixty thousand nine hundred and eighty-six dollars and sixty-six cents
70 (60,986.66); Catharine Earl and Abraham Riker, executors of Morris J. Earl, deceased, twenty-one thousand eight hundred and ninety dollars (21,890.00); Joseph W. Ward, ninety eight thousand six hundred and thirty-one dollars and forty-one cents (98,631.41); Thomas Upham, executor of William P. Emerson, eighteen thousand two hundred and ninety-one dollars and forty cents (18,291.40); John J. Dixwell, nine thousand three hundred and forty-nine dollars and twenty-two cents (9,349.22); J. Smith, eight thousand nine hundred and fifty-three dollars and twenty cents (8,953.20); W. R. Rolston, six thousand eight hundred and seventy-eight dollars and thirty-five cents (6,878.35); John W. Kennicott, six thousand nine hundred and forty dollars and sixty-five cents (6,940.65); Andrew H. Ward, eight thousand and sixteen dollars and eighty-one cents (8,016.81); J. Burnett, four thousand six hundred and twenty-seven dollars and ten cents (4,627.10); William C. Plunkett, four thousand five hundred and sixty-four dollars and eighty cents (4,564.80); J. L. Priest, one thousand one hundred and fifty-six dollars and seventy-seven cents (1,156.77); E. W. Stone, one thousand one hundred and fifty-six dollars and seventy-seven cents (1,156.77); J. Sargent Smith, one thousand and ninety-five dollars (1,095.00); H. V. Davis, one thousand and ninety-five dollars (1,095.00); A. F. Gould,
71 six hundred and eighty-one dollars and twenty-six cents (681.26); William P. Hodges, one hundred and eighty-five thousand six hundred and forty-four dollars and ninety-two cents (185,644.92); Isaac Taylor, twenty-nine thousand six hundred and seventy-nine dollars and seven cents (29,679.07); Ransom, Geer & Co., twenty-seven thousand

three hundred and eighteen dollars and seventy five cents (27,318,75); Ned A. Clark, twenty-one thousand five hundred and eighty-five dollars and thirty cents (21,585 30); McMartin and Alexander, administrators of Peter McMartin, deceased, twelve thousand six hundred and thirty-one dollars and seven cents (12,631.07); Nathaniel H. Streetor, seven thousand one hundred and thirty dollars and seventy cents (7,130.70); Ammidown, Lane & Co., two thousand three hundred and seventy-six dollars and ninety cents ($2,376.90); N. H. Holden, one thousand one hundred and eighty-eight dollars and forty-five cents ($1,188.45); Roxanna Trego, one thousand one hundred and twenty-five dollars and sixty two cents ($1,125.62); Herman Powers, one thousand and ninety-five dollars ($1,095.00); Glenn and Sprayberry, twenty-five thousand four hundred and forty nine dollars and five cents ($25,449.05);
72 J. L. Bleakley, nine thousand three hundred and eighty dollars and ninety cents ($9,380.90); H. Fuller, four thousand six hundred and ninety dollars and forty-five cents ($4,690.45); Hosea Birdsall, sixty-four thousand six hundred and ninety seven dollars and twenty cents ($64,697.20); Lucius F. Reed, twenty-six thousand eight hundred and ninety two dollars and eighty-five cents ($26,892.85); Clark L. Potter, seventy-six thousand eight hundred and nine dollars and twenty-five cents ($76,809.25); Joseph Waxelbaum, two thousand three hundred and thirteen dollars and fifty-five cents ($2,313.55); James O. Faircloth, twenty thousand four hundred and fifty-four dollars and twenty-seven cents ($20,454 27); Caleb Underhill, seven thousand and four dollars ($7,004.00); James S. Hendrickson, eleven thousand eight hundred and twenty-one dollars and fifteen cents ($11,821.15); Oliver D. Taylor, seventeen thousand five hundred and forty-two dollars and thirty-six cents ($17,542.36); Benjamin Wise, twelve thousand and ninety-one dollars and thirty-five cents ($12,091.35); James F. Hendrickson, fourteen thousand two hundred and sixty-one dollars and forty cents ($14,261.40); Thompson E. F. Randolph, eleven thousand eight hundred and eighty-four dollars and fifty cents ($11,884.50);
73 William C. Potter, one thousand nine hundred and twenty-five dollars ($1,925 00). And it is further ordered, adjudged, and decreed, and this court, by virtue of the power and authority therein vested, doth order, adjudge and decree, that all and singular the lands and premises in the said trust-deed and mortgage in the said interlocutory decree in this cause mentioned and described, or so much thereof as may be necessary to raise the amount so due to the said respective parties, with interest from the first day of May, 1874, together with the costs of this suit unpaid, and the expenses and fees of sale, be sold for cash in hand, at public auction separately, in parcels of not more than one hundred and sixty acres (160) each by John A. Jones, master in chancery of this court, at the front door of the court-house in Fairfield, Wayne County, Illinois, between the hours of nine in the morning and the setting sun on the day named, and from day to day on adjournment, fixed thereafter, that the said master give public notice, according to law, of the time and place of such sale, by previously publishing the same for the space of four successive weeks in a public newspaper published in said county of Wayne; that the said master, on the sale of said mortgaged premises, execute certificates of purchase to the purchasers thereof, which certificate shall
74 specify the lands purchased and the sum paid therefor, and the time when the purchaser will be entitled to a deed for such lands, unless the same shall be redeemed according to the statutes of the State of Illinois; and the said master shall file a duplicate of every such

certificate issued by him. The said master is directed (on coming in and confirmation of his report of said sale) out of the proceeds of said sale to retain his disbursements and commissions on said sale, and that he pay in to the clerk of this court the taxable costs of the complainants in this suit for the benefit of the parties entitled thereto, and that out of the remainder of said proceeds the said master pay to each of said complainants and the said parties and persons aforesaid, the said amount as reported by the said master and above decreed as due to each with the interest from the first day of May, 1874; or if said remainder shall be insufficient to pay the whole in full, such percentage of the same as the amount due shall bear to the whole sum to be distributed in proportion, and that in case said premises should sell for more than sufficient to pay the said expenses of sale, taxable costs and principal and interest, then the said master, after making
75 payment as aforesaid, bring such surplus into court without delay, to abide the further order thereof; and it is further ordered, adjudged and decreed that the said defendants and the county of Wayne, their successors and all persons claiming under them as purchasers or grantees pendente lite since the commencement of this suit be forever barred and foreclosed by this decree from all equity of redemption of, in and to said mortgaged premises, and any part and parcel thereof unless redeemed as aforesaid, and that if said premises are not redeemed as aforesaid according to the laws of Illinois, said master execute deeds therefor; and it is further ordered, adjudged and decreed, that upon the execution and delivery of the conveyances aforesaid, the said purchaser or purchasers, his or their representatives or assignees be let into possession of said mortgaged premises, and that any of the said defendants, the county of Wayne or the Mount Vernon Railroad Company, or purchasers pendente lite under either of them, who may be in possession of said premises or any part thereof, and any who since the commencement of this suit, has come into possession under them or either of them, on the production of the said master's deed of conveyance of said premises, under the sale thereby and here-
76 in authorized surrender possession thereof to such purchaser or purchasers, their representatives or assigns, or on refusal so to do, be considered in contempt of this court; and it is further ordered that the said master make report of his proceedings in the premises with all convenient speed. The particular description and location of the lands and premises in the said mortgage and trust deed mentioned, and by this decree ordered to be sold is as follows, to wit: The lands situate in the county of Wayne, in the State of Illinois, particularly described as follows: (The lands described in this decree are the same as those in the mortgage, and the further description is omitted by agreement of the parties.)

Exhibit F.—Date of decree April 30, 1877.

Decree in Supreme Court of United States.

(The recital of the decree of the circuit court is here omitted by agreement of parties.)

And whereas in the present term of October, in the year of our Lord, one thousand eight hundred and seventy-six, the said cause came on to be heard before the said Supreme Court, on the said transcript of record and was argued by counsel. On consideration whereof it is now
77 here ordered, adjudged and decreed by the court that the said decree of the said circuit court in this cause be and the same is hereby affirmed with costs and interest until paid at the same rate per annum that similar decrees bear in the courts of the State of Illi-

nois, and that the said complainants, John W. Kennicott, Joseph W. Ward, Andrew H. Ward, et al., recover against the said the board of supervisors of Wayne County, impleaded with the Mount Vernon Railroad Company five hundred and thirteen dollars and fifty-five cents for their costs herein expended, and that execution issue, &c.

Inasmuch as the matters and things above set forth do not appear of record, the defendants, except said Handley and McCartney, ask that the same be made so by the signing of this bill; and the same is accordingly done.

S. H. TREAT, [L. S.]
District Judge.

(Indorsed:) Filed July 26, 1878, J. A. Jones, clerk.

And afterwards, to wit, on the 16th day of September in the year last aforesaid, came said defendants by their attorneys and filed in said clerk's office their bond on writ of error and power of attorney to J. D. Shaeffer from J. V. Baugh in said cause, which said bond on writ
78 of error and power of att'y are in the words and figures following, to wit:

Bond on writ of error.

Circuit court of the United States, southern district of Illinois.

Action of debt on appeal bond.

JOHN W. KENNICOTT, JOSEPH W. WARD, Andrew H. Ward, Ebenezer W. Stone, Catharine Earl and Abraham Earl, executors of Morris J. Earl, deceased, Francis E. Parker & William B. Bacon, administrators, & Eliza A. Wakefield, administratrix of Cyrus Wakefield, deceased, J. Sargent Smith, Thomas Upham, Maria Myers, adm'x of Austin Myers, dec'd, Thomas Upham, executor of John W. Emerson, deceased, John H. Brown, Henry V. Davis, William R. Hodges, John L. Priest, William C. Plunkett, John J. Dixwell, Joseph Smith, Arthur F. Gould, Joseph Burnett, William L. Rolston, Roxana Cregs, Richard P. Glenn, James S. Hendrickson, Oliver D. Taylor, L. F. Reed, Clark L. Potter, Joseph Maxelbaum, James Q. Fairclocth, Caleb Underhill, William C. Potter, Thompson E F. Randolph, Hosea Birdsall, James F. Hendrickson & Benjamin Wise,

vs.

THOMAS L. COOPER, OLIVER HOLMES, WILLIAM Shaeffer, John A. Moffett, John Keen, jr., A. M. Funkhouser, C. C. Boggs, William W. George, Jo. G. Crews, D. W. Barkley, T. A. Martin, N. E. Roberts, O. W. Harvey, R. T. Forth, John I. Farmer, Joel V. Baugh, Edward Bonham, L. J. Rider, A. B. Rider, John R. Carter, Lafayette Butler, Fred Bes-
79 tow, C. W. Summers, Jacob Hall, The County of Wayne, by its board of supervisors, impleaded with R. P. Hanna, G. J. George, Geo. W. Pitcher, Daniel L. McCawley, and others.

Know all men by these presents that we, the board of supervisors of Wayne County, Illinois, Thomas L. Cooper, Oliver Holmes, William Shaeffer, John A. Moffitt, John Keen, jr., A. M. Funkhouser, C. C. Boggs, William W. George, Jo. G. Crews, D. W. Barkley, T. A. Martin, N. E. Roberts, O. W. Harvey, R. T. Forth, John I. Farmer, Joel V. Baugh, Edward Bonham, L. J. Rider, A. B. Rider, John R. Carter, Lafayette Butler, Fred Bestow, C. W. Summers, Jacob Hall, G. J. George, Adam Rinard, R. E. Mabry, B. M. Garner, Sol. Koontz, John Morris, J. D. Shaeffer, Geo. W. Pitcher, O. P. Patterson, O. F. Barkley, J. T. Fleming, R. P. Hanna, S. W. Vertress, J. R. Creighton, Wm. J. Sailor, T. M. Rogers, G. M. Davis, Cassius E. Sibley, B. F. Leininger, Francis Bean, R. L. Boggs, A. Cunningham, B. D. Roby, J. B. Shaeffer, Wm. N. Borah, W. H. Robinson, and others, are held and firmly bound the said plaintiffs, John W. Kennicott and others, in the sum of fifty thousand dollars, to be paid to the said plaintiffs, the said John W. Kennicott and others, their heirs or assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of hour heirs, executors, and administrators, firmly by these presents, *with* sealed with our seals, and dated this 13th day of September, A. D. 1878.

80 Whereas the above-named board of supervisors of Wayne County, Illinois, Thomas L. Cooper, Oliver Holmes, William Shaeffer, John A. Moffitt, John Keen, jr., A. M. Funkhouser, C. C. Boggs, William W. George, Jo. G. Crews, D. W. Barkley, T. A. Martin, N. E. Roberts, O. W. Harvey, R. T. Forth, John I. Farmer, Joel V. Baugh, Edward Bonham, L. J. Rider, A. B. Rider, John R. Carter, Lafayette Butler, Fred Bestow, C. W. Summers, and Jacob Hall, impleaded, &c., have prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above-entitled suit by the circuit court of the United States for the southern district of Illinois, on the 26th day of July, A. D. 1878, which judgment was for $40,000.^{00} debt and $40,000 damages, to be discharged on payment of $40,000 & cost.

Now, therefore, the condition of this obligation is such, that if the above named board of supervisors of Wayne County, Illinois, Thomas L. Cooper and others, the aforesaid defendants, shall prosecute their said writ of error with effect, and shall answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

The county of Wayne by its board of supervisors:

ISAAC B. CARSON,
Chairman of Board of Supervisors of Wayne County, Illinois. [SEAL.]

81 Attest:
[L. S.] J. D. SHAEFFER, *Co. Clerk.*

Lafayette Butler.	[Seal.]	John S. Felix.	[Seal.]
A. M. Funkhouser.	[Seal.]	C. C. Boggs.	[Seal.]
Jacob Hall.	[Seal.]	Edward Bonham.	[Seal.]
O. W. Harvey.	[Seal.]	John Keen, jr.	[Seal.]
John I. Farmer.	[Seal.]	John O. Moffit.	[Seal.]
R. T. Forth.	[Seal.]	Oliver Holmes.	[Seal.]
G. J. George.	[Seal.]	Jo. G. Crews.	[Seal.]
Adam Rinard.	[Seal.]	D. W. Barkley.	[Seal.]
R. E. Mabry.	[Seal.]	Wm. Shaeffer.	[Seal.]

B. M. Garner. [Seal.]
Sol. Koontz. [Seal.]
John Morris. [Seal.]
J. D. Shaeffer. [Seal.]
Geo. W. Pitcher. [Seal.]
O. P. Patterson. [Seal.]
O. F. Barkley. [Seal.]
J. T. Fleming. [Seal.]
R. P. Hanna. [Seal.]
S. W. Verterss, M. D. [Seal.]
J. R. Creighton. [Seal.]
Wm. J. Sailor. [Seal.]
T. M. Rogers. [Seal.]
82 H. F. Vaughan. [Seal.]
W. H. Robinson. [Seal.]
C. M. his + mark. Tibbs. [Seal.]
Witness: E. Beecher.
J. S. C. Hall. [Seal.]
N. S. Davis. [Seal.]
Vol. C. Borah. [Seal.]
Anderson L. Wall. [Seal.]
W. H. Parterfield. [Seal.]
F. Andrews. [Seal]
David Holmes. [Seal.]
F. A. Kutz. [Seal.]
E. Blackford. [Seal.]
J. C. Boldridge, jr. [Seal.]
Andrew F. Nisbet. [Seal.]
C. W. Alisher. [Seal.]
Jas. B. Pendleton. [Seal.]
G. E. Branch. [Seal.]

L. J. Rider. [Seal.]
A. B. Rider. [Seal.]
N. E. Roberts. [Seal.]
John R. Carter. [Seal.]
P. L. Cooper. [Seal.]
F. Bestow. [Seal.]
W. W. George. [Seal.]
C. W. Summers. [Seal.]
T. H. Martin. [Seal.]
Joe V. Baugh, [Seal.]
By J. D. Shaeffer, att'y in fact. [Seal.]
John Flick. [Seal.]
C. G. Archibald. [Seal.]
J. P. Rider. [Seal.]
G. M. Davis. [Seal.]
Cassius E. Sibley. [Seal.]
B. F. Leininger. [Seal.]
Francis Bean. [Seal.]
R. L. Boggs, M. D. [Seal.]
A. Cunningham. [Seal.]
R. D. Roby. [Seal.]
M. M. Wheeler. [Seal.]
Nathan Crews. [Seal.]
H. F. Carter. [Seal.]
Henry Woley. [Seal.]
J. B. Shaeffer. [Seal.]
Samuel Brown. [Seal.]
Wm. M. Branson. [Seal.]
William N. Borah. [Seal.]
A. H. Baker. [Seal.]
T. W. Dickey. [Seal.]

Board of Supervisors, September term, A. D. 1878.

On motion, it is ordered that—

Whereas the United States circuit court for the southern district of Illinois did, on the 26th day of July, 1878, in the case of John W. Kennicott et al. vs. Wayne County, Oliver Holmes, Edward Bonham, R. T. Forth, T. L. Cooper, John A. Moffitt, and others, render a judgment against said defendants in said case for forty thousand dollars:

83 Therefore it is hereby ordered that an appeal be taken from said judgment by said board of supervisors of said Wayne County, and that the chairman of this board be hereby directed to execute an appeal bond therein in the name of and for said county of Wayne for the penal sum of fifty thousand dollars, conditioned as is required by law, and that the clerk of this court attach the seal thereof thereto, and attest the same, and that said bond, when completed by signatures of securities thereon, be transmitted to the clerk of said United States court and filed with him; and that the board pledge to any parties who may sign or have signed such bond as securities full indemnity and protection from damages thereon; which motion was adopted by the board, on a call of ayes and nays, by the following vote:

AYES.—Joseph Burkett, N. N. Borah, M. H. Crews, Geo. H. Hilliard, Solomon Koontz, William Knodell, William Mabery, John Mann, James A. Paul, Philip H. Sams, and Milton A. Taylor—11 votes for.

NAYES.—W. S. Archibald, Jacob Milner, D. M. Williams, and J. B. Carson—4 votes against.

STATE OF ILLINOIS,
Wayne County, ss:

I, Joseph D. Shaeffer, clerk of the county court in and for said county and State, do hereby certify that the foregoing is a true and cor-
84 rect copy of an order made and had by the board of supervisors of said county, at its September session, 1878, made on the third day of the term, being the 12th day of September, 1878, and recorded on supervisors' record D, page 153. All of which as appears of record in my office.

In testimony whereof I have hereunto set my hand, and seal of said court being hereunto affixed, at my office in Fairfield, this 13th day of September, A. D. 1878.

[L. S.] J. D. SHAEFFER,
County Clerk.

STATE OF ILLINOIS,
County of Wayne, ss:

William J. Sailor and George W. Johns, being each duly sworn, on oath says that said William J. Sailor is cashier of the banking-house of E. Bonham & Co., and that said George W. Johns is cashier of the banking-house of Forth, Robinson & Co., both of said banks being located at Fairfield, Wayne County, Illinois, and that we are well acquainted all or nearly all of the sureties on the foregoing bond, and that said sureties are possessed of real and personal property in this county of value far exceeding the sum of $50,000, and that we have no hesitancy in stating that said sureties amply and abundantly secure said
85 sum of money and make said bond good beyond question.

W. J. SAILOR.
G. W. JOHNS.

Sworn to and subscribed before me this 13th day of September, 1878.
[L. S.] JOHN KEEN, JR., *N. P.*

Edwin Beecher being duly sworn, deposes and says: I am personally well acquainted with the value of the property of most of the signers of the annexed bond, and believe such property to be fully worth the sum of one hundred thousand dollars, after allowing for all indebtedness of said signers and all exemptions authorized by the statutes of Illinois.

EDWIN BEECHER.

Subscribed & sworn to before me this 16th day of September, A. D. 1878.

J. A. JONES, *Clerk.*

The within bond approved by me this 16 day of September, A. D. 1878.

J. A. JONES, *Clerk.*

(Endorsed:) Filed September 16th, 1878. J. A. Jones, clerk.

Power of att'y to Shaeffer.

Know all men by these presents that I, J. V. Baugh, of the
86 city of Evansville, county of Vanderburgh, in the State of Indi-

ana, have made, constituted, and appointed, and by these presents do make, constitute, and appoint Joseph D. Shaeffer, of the city of Fairfield, county of Wayne, and State of Illinois, true and lawful attorney for me and in my name, place, and stead, to sign and seal for me the appeal bond in the case of Kennicott et al. vs. Wayne County, myself, and others, wherein judgment for 40,000$ has been entered by the U. S. circuit court, at Springfield, Illinois, giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever, requisite and necessary to be done in and about the premises, as fully, to all intents and purposes, as I might or could do if personally present at the doing thereof, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney or his substitute shall lawfully do or cause to be done by virtue hereof.

In testimony whereof I have hereunto set my hand and seal this 26th day of August, 1878.

JOE V. BAUGH. [SEAL.]

Signed, sealed, and delivered in presence of—
CHAS. H. MCCARER.
JOHN LENIHAN, JR.

STATE OF INDIANA,
County of Vanderburgh, ss:

87 I, Chas. H. McCarer, a notary public, in and for and residing in the said county in the State aforesaid, do hereby certify that Joe V. Baugh, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that he signed, sealed, and delivered the said instrument as his free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and notarial seal this twenty-sixth day of August, A. D. 1878.

[L. S.] CHAS. H. McCARER,
Notary Public.

(Endorsed:) Filed September 16th, 1878. J. A. Jones, clerk.

88 UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

I, John A. Jones, clerk of the circuit court of the United States within and for said southern district of Illinois, do hereby certify that the foregoing is a true and correct copy of the summons issued, declaration, bond sued on, plea of James McCartney, demurrer, McCartney's motion for new trial, Handley's motion for new trial, bill of exceptions, bond on writ of error, and power of att'y from Baugh to Shaeffer filed, and all proceedings in relation thereto, in a certain cause wherein John W. Kennicott, Joseph W. Ward, Andrew H. Ward, Ebenezer W. Stone, Catherine Earle and Abraham Riker, executors of Morris J. Earle, deceased, Francis E. Parker and William B. Bacon, administrators, etc., and Eliza A. Wakefield, administratrix of Cyrus Wakefield, deceased, J. Sargent Smith, Thomas Upton, Maria Myers, administratrix of Austin Myers ,deceased, Thomas Upton, executor of John W. Emerson, deceased, John H. Brown, Henry V. Davis, William R. Hodges, John L. Priest, William C. Plunkett, John J. Dixwell, Joseph Smith, Arthur F. Gould, Joseph Burnett, and William L. Ralston, plaintiffs, who sue

for the use of themselves and of Roxana Crego, Richard P. Glen' James S. Hendrickson, Oliver D. Taylor, L. F. Reed, Clark L. Potter' Joseph Maxelbaum, James Q. Faircloth, Caleb Underhill, William
89 C. Potter, Thomas E. F. Randolph, Hosea Birdsall, James F. Hendrickson, and Benjamin Hise, are plaintiffs, and Oliver Holmes, Thomas L. Cooper, William Shaffer, R. T. Forth, Edward Bonham, A. B. Rider, L. I. Rider, John L. Handley, John A. Moffett, John Keen, jr., A. M. Funkhouser, C. C. Boggs, William W. George, James McCartney, J. G. Crews, D. W. Barkley, T. A. Martin, N. E. Roberts, O. W. Harvey, John I. Farmer, J. V. Baugh, John R. Carter, Lafayette Butler, C. W. Summers, Jacob Hall, and Fred Bestow, and the Board of Supervisors of Wayne County, impleaded with Daniel L. McCawley, O. P. Patterson, G. J. George, D. C. Graves, Francis Kelly, T. J. Mayers, John D. Simpson, N. N. Horah, William Halloway, E. W. Mabray, W. C. Kennerly, Moses Renfrow, Thomas J. Butler, Stephen Fils, James M. Butler, M. B. Kinnerly, Daniel Talkington, J. E. Kinnerly, D. K. Felix, John Felix, William J. Vaughan, Samuel Berry, Marion T. Berry. A. W. Womack, C. Walter, I. M. Hawes, M. R. Whitson, Henderson Glidewell, Aaron B. Miller, George W. Ritcher, Caleb Crews, John Harvey, T. W. Dickey, B. F. Harris. John Walton, A. G. Borah, J. C. Staton, John W. Cissna, H. M. Twaddell, George T. Lawrence, William H. Grant, James B. Manahan, M. M. Wheeler, H. B. Johnson, William Pasco, William Stephens, Jacob Mather, William R. Barr, William H. Stephens, George G. Feather, E. J. Miller, James Y. McBill, C. W. Willison, and Robert P. Hanna are defendants,
90 as fully and completely as the same appear of file and of record in my said office.

Witness my hand and the seal of said court, at Springfield, in said district, this 26th day of September, in the year of our Lord eighteen hundred and seventy-eight, and of our Independence the one hundred and third year.

[SEAL.] J. A. JONES, *Clerk.*

91 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States, for the southern district of Illinois, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said court, before you, wherein Oliver Holmes, Thomas L. Cooper, William Shaffer, R. T. Forth, Edward Bonham, A. B. Rider, L. J. Rider, John L. Handley, John A. Moffett, John Keen, jr., A. M. Funkhouser, C. C. Boggs, William W. George, James McCartney, J. G. Crews, D. W. Barkley, T. A. Martin, N. E. Roberts, O. W. Harvey, John I. Farmer, J. V. Baugh, John R. Carter, Lafayette Butler, C. W. Summers, Jacob Hall, and Fred. Bestow, & the Board of Supervisors of Wayne County, impleaded with Daniel L. McCawley, O. P. Patterson, G. J. George, D. C. Graves, Francis Kelly, T. J. Mayers, John D. Simpson, N. N. Borah, William Holloway, E. W. Mabry, W. C. Kennerly, Moses Renfrow, Thomas J. Butler, Stephen File, James M. Butler, M. B. Kinerly, Daniel Talkington, J. E. Kinnerly, D. K. Felix, John Felix, William J. Vaughan, Samuel Berry, Marion T. Berry. A. W. Womack, C. Walter, I. M. Hawes, M. R. Whitson, Henderson Glidewell, Aaron B. Miller, George W. Ritcher, Caleb Crews, John Harvey, T. W. Dickey, B. F. Harris, John Walton, A. G. Borah, J. C. Staton, John W. Cissna, H. M. Twaddell, George T. Law-

rence, William H. Grant. James B. Manahan, M. M. Wheeler, H. B. Johnson, William Pasco, William Stephens, Jacob Mather, William R. Barr, William H. Stephens, George G. Feather, E. J. Miller,
92 James Y. McBill, C. M. Willison, and Robert P. Hanna, are plaintiffs in error, and John W. Kennicott, Joseph W. Ward, Andrew H. Ward, Ebenezer W. Stone, Catherine Earle, and Abraham Riker, executors of Morris J. Earle, deceased, Francis E. Parker and William B. Bacon, administrators, etc., and Eliza A. Wakefield, administratrix of Cyrus Wakefield, deceased, J. Sargent Smith, Thomas Upton, Maria Myers, administratrix of Austin Myers, deceased, Thomas Upton, executor of John W. Emerson, deceased, John H. Brown, Henry V. Davis, William R. Hodges, John L. Priest, William C. Plunkett, John J. Dixwell, Joseph Smith, Arthur F. Gould, Joseph Burnett, and William L. Rolston, plaintiffs, who sue for the use of themselves and of Roxana Crego, Richard P. Glen, James S. Hendrickson, Oliver D. Taylor, L. F. Reed, Clark L. Potter, Joseph Maxelbaum, James Q. Faircloth, Caleb Underhill, William C. Potter, Thomas E. F. Randolph, Hosea Birdsall, James F. Hendrickson, & Benjamin Hise, are defendants in error, a manifest error hath happened, to the great damage of the said plaintiffs in error, as by their complaint appears: We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the
93 United States, together with this writ, so that you may have the same at Washington, on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, at Springfield, in said district, this twentieth day of December, in the year of our Lord eighteen hundred and seventy-eight, and of our Independence the one hundred and third year.

[SEAL.] J. A. JONES,
Clerk.

94 UNITED STATES OF AMERICA, *ss:*

To John W. Kennicott, Joseph W. Ward, Andrew H. Ward Ebenezer W. Stone, Catherine Earle, and Abraham Riker, executors of Morris J. Earle, deceased, Francis E. Parker, and William B. Bacon, administrators, etc., and Eliza A. Wakefield, administratrix of Cyrus Wakefield, deceased, J. Sargent Smith, Thomas Upton, Maria Myers, administratrix of Austin Myers, deceased, Thomas Upton, executor of John W. Emerson, deceased, John H. Brown, Henry V. Davis, William R. Hodges, John L. Priest, William C. Plunkett, John J. Dixwell, Joseph Smith, Arthur F. Gould, Joseph Burnett, and William L. Rolston, plaintiffs, who sue for the use of themselves and of Roxana Crego, Richard P. Glen, James S. Hendrickson, Oliver D. Taylor, L. F. Reed, Clark L. Potter, Joseph Maxelbaum, James Q. Faircloth, Caleb Underhill, William C. Potter, Thomas E. F. Randolph, Hosea Birdsall, James F. Hendrickson, and Benjamin Hise, greeting:

You are hereby cited and admonished to be and appear at a Supreme

Court of the United States to be held at Washington on the second Monday of October next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the southern district of Illinois, wherein Oliver Holmes, Thomas L. Cooper, William Shaffer, R. T. Forth, Edward Bonham, A. B. Rider, L. I. Rider, John L. Handley, John A. Moffett, John Keen, jr., A. M. Funkhouser, C. C. Boggs, William W. George, James McCartney, J. G. Crews, D. W. Barkley, T. A. Martin, N. E. Roberts, O. W. Harvey, John I. Farmer, J. V. Baugh, John
95 R. Carter, Lafayette Butler, C. W. Summers, Jacob Hall, and Fred. Bestow & the Board of Supervisors of Wayne County, impleaded with Daniel L. McCawley, O. P. Patterson, G. J. George, D. C. Graves, Francis Kelly, T. J. Mayers, John D. Simpson, N. N. Borah, William Halloway, E. W. Mabry, W. C. Kennerly, Moses Renfrow, Thomas J. Butler, Stephen Fils, James M. Butler, M. B. Kinerly, Daniel Talkington, J. E. Kinnerly, D. K. Felix, John Felix, William J. Vaughan, Samuel Berry, Marion T. Berry, A. W. Womack, C. Walter, I. M. Hawes, M. R. Whitson, Henderson Glidewell, Aaron B. Miller, George W. Ritcher, Caleb Crews, John Harvey, T. W. Dickey, B. F. Harris, John Walton, A. G. Borah, J. G. Staton, John W. Cissna, H. M. Twaddell, George T. Lawrence, William H. Grant, James B. Manahan, M. M. Wheeler, H. B. Johnson, William Pasco, William Stephens, Jacob Mather, William R. Barr, William H. Stephens, George G. Feather, E. J. Miller, James Y. McBill, C. M. Willison, and Robert P. Hanna are plaintiffs, and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Samuel H. Treat, judge of the district court of the United States, for the southern district of Illinois, this twentieth day of September, in the year of our Lord eighteen hundred and seventy-eight, and of our Independence the one hundred and third year.

S. H. TREAT.

We hereby acknowledge service of the foregoing citation, Sept. 26th, 1878.

J. A. McCLERNAND &
N. M. BROADWELL.

96 *Assignment of errors.*

Supreme Court of the United States.—October term, A. D. 1878.

Error to southern district of Illinois.

THE BOARD OF SUPERVISORS OF WAYNE County, Illinois; Thomas L. Cooper, Oliver Holmes, William Shaeffer, John A. Moffit, John Keen, jr.; A. M. Funkhouser, C. C. Boggs, William W. George, Jo. G. Crews, E. W. Barkley, T. A. Martin, N. E. Roberts, O. W. Harvey, R. T. Forth, John I. Farmer, Joel V. Baugh, Edward Bonham, L. J. Rider, A. B. Rider, John R. Carter, LaFayette Butler, Fred. Bestow, C. W. Summers, Jacob Hall,

vs.

JOHN W. KENNICOTT, JOSEPH W. WARD, Andrew H. Ward, Ebenezer W. Stone, Catharine Earl, and Abraham Riker, executors of Morris J. Earl, deceased; Francis E. Parker, and William B. Bacon, administrators; and Eliza A. Wakefield, administratrix of Cyrus Wakefield, deceased; J. Sargent Smith, Thomas Upton, Maria Myers, administratrix of Austin Myers, deceased; Thomas Upton, executor of John W. Emerson, deceased; John H. Brown, Henry V. Davis, William R. Hodges, John L. Priest, William C. Plunkett, John J. Dixwell, Joseph Smith, Arthur F. Gould, Joseph Burnett, and William Ralston, Roxanna Crego, Richard P. Glenn, James Hendrickson, Oliver D. Taylor, L. F. Reed, Clark L. Potter, Joseph Maxelbaum, James Q. Faircloth, Caleb Underhill, William C. Potter, Thompson E. F. Randolph, Hosea Birdsell, James F. Hendrickson, & Benjamin Hise.

97 And now comes the said board of supervisors of Wayne County, Thomas L. Cooper, Oliver Holmes, and others, plaintiffs in error aforesaid, by J. C. Robinson, their attorney, and say, that in the record and proceedings aforesaid there is manifest error in this, to wit:

1st. The court erred in finding the issues for the plaintiffs below (the defendants herein).

2d. The court erred in overruling the motion of plaintiffs in error for a new trial.

3d. The court erred in overruling the motion of plaintiffs in error in arrest of judgment.

4th. The court erred in overruling the second motion of plaintiffs in error in arrest of judgment and for a discontinuance of the suit.

5th. The court erred in dismissing the suit as to a part of the original defendants below, without dismissing as to all.

6th. The court erred in entering a judgment for defendants in error, and against plaintiffs in error.

By reason whereof said plaintiffs pray that said judgment may be reversed, &c.

J. C. ROBINSON,
Att'y for Pl'ffs in Error.

98 (Indorsed:) Sup. Court U. S. 1878, Octo. term. No. 805. Board of supervisors of Wayne County & al. vs. John W. Kennicott & al. Assignments of error. Filed 7th October, 1878.

(Indorsement on cover:) No. 500. The Board of Supervisors of Wayne County, Oliver Holmes, Thomas L. Cooper, William Shaffer, et al., plaintiffs in error vs. John W. Kennicott, Joseph W. Ward, et al. S. Illinois C. C. U. S. Filed 2nd October, 1878.

Supreme Court of the United St

NO. 219.

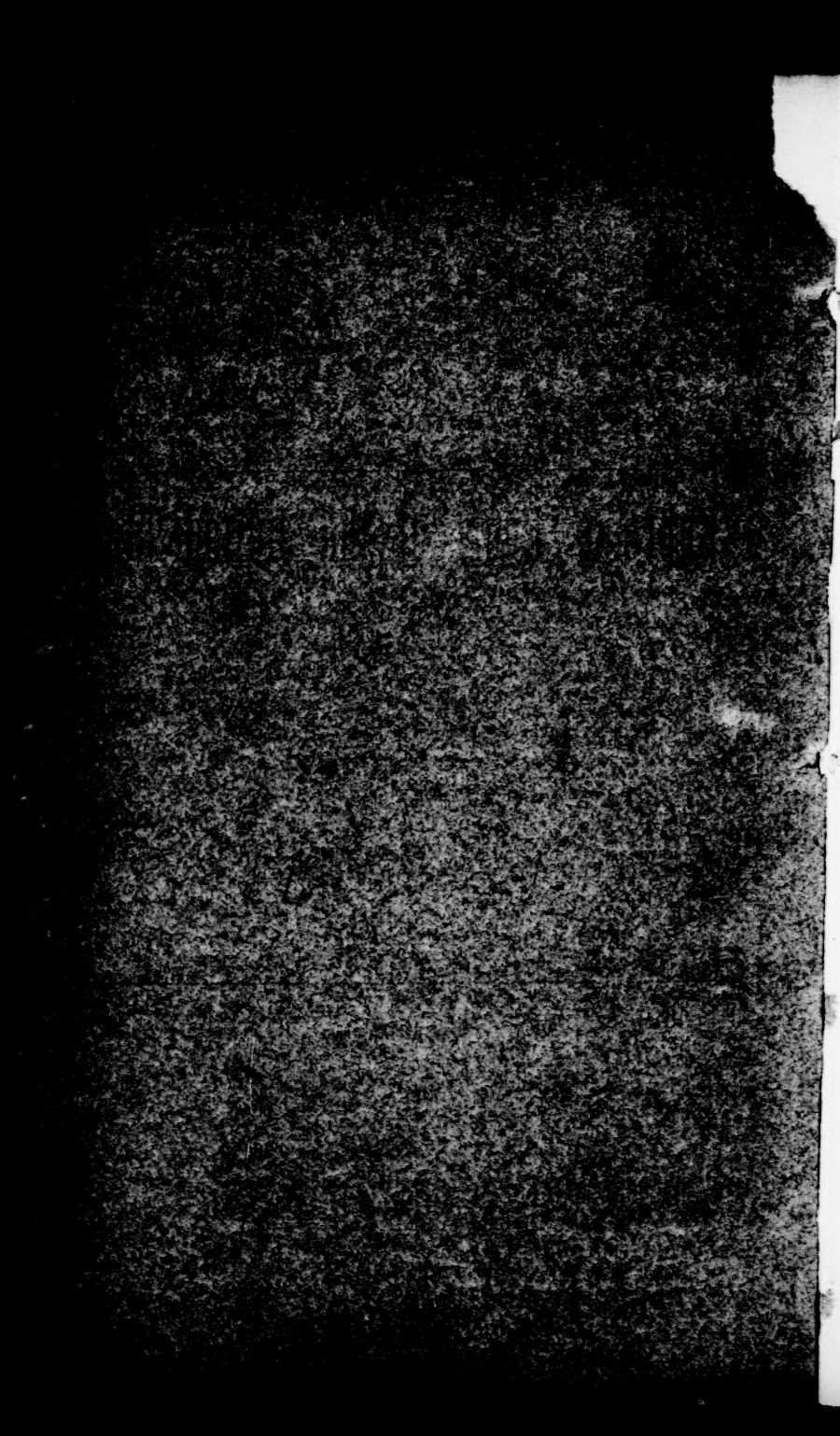
THE BOARD OF SUPERVISORS OF WAYNE COUNTY, OLIVER HOLMES, THOMAS L. COOPER, WILLIAM SHAR ET. AL., PLAINTIFFS IN ERROR,

vs.

JOHN W. KENNICOTT, JOSEPH W. WARD, ET. AL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTH DISTRICT OF ILLINOIS.

BRIEF AND ARGUMENT OF PLAINTIFFS IN ERROR.



Supreme Court of the United States.

October Term, A. D. 1880.

THE BOARD OF SUPERVISORS OF WAYNE COUNTY, OLIVER HOLMES, ET. AL., PLAINTIFFS IN ERROR,

vs.

JOHN W. KENNICOTT, ET. AL.

Error to the Circuit Court of the U. S. for the Southern District of Illinois.

ABSTRACT.

[The references on the margin are to the pages of the printed record.]

This was a suit brought by defendants in error against plaintiffs in error, on an appeal bond executed by said plaintiffs in error, in the case of John W. Kennicott *et. al.* vs. the Board of Supervisors, imp. &c. which was a suit in chancery brought to foreclose a mortgage and deed of trust executed by Wayne county on certain lands owned by the county.

3 The declaration, after stating the execution of the bond, sets out the conditions thereof and breaches as follows: "That if the above named Board of Supervisors, impleaded, &c., should prosecute their said appeal with effect and should answer all damages and costs if they should fail to make good their plea, then said writing obligatory should be void; otherwise to remain in full force and virtue; and although afterwards, to-wit, on, &c., said decree was affirmed by said Supreme Court, and judgment rendered against said board of supervisors for the costs of said court for a

large sum, to-wit, $1,000, as by the record of said Supreme Court will more fully appear; and although a large amount of damages hath accrued to the said plaintiffs by the failure of the said board of supervisors to make good their plea, to-wit, the amount of $100,000, consisting of $40,000 of interest which accrued on said decree during the pendency of said appeal, which is wholly unpaid; and of $200,000 of said decree remaining unsatisfied by sale of the lands ordered by said decree; and of $50,000 depreciation in the value of said lands during the pendency of said appeal; and of $25,000 attorney's fees for attending to said appeal; and $50,000 taxes on said lands during the pendency of said appeal. Then follows a general

5 averment that defendants had not paid, &c.

With the declaration was a copy of the bond declared on which is found on p. 5 of printed record.

10 The case was submitted to the court without the intervention of a jury, on a stipulation in writing which is set out in full in the bill of exceptions. *Such stipulation recited that proper pleas were on file.* The court found for plaintiffs, on such stipulation, $40,000,—the penalty of the bond.

11 Motion for new trial by defendants.

12 Special motion for new trial, for causes set out in motion, by defendants James McCartney and J. L. Handley.

14 Motion sustained as to McCartney and Handley, and overruled as to the other defendants.

Motion in arrest of judgment, for reasons set forth in the motion, by all defendedts except McCartney and Handley. Motion overruled, "and thereupon the plaintiffs discontinue this suit as against the defendants James McCartney and John L. Handley.

15 The said defendants, (except said McCartney and Handley) again entered a motion in arrest of judgment and to discontinue said suit for the reasons set out in said motion, (see p. 15 of printed record), which motion was overruled by the court and judgment entered as of that day in favor of plaintiffs below and against all of said defendants except said McCartney and Handley and writ of error allowed.

BILL OF EXCEPTIONS.

16 The bill of exceptions recites that the case is submitted to

the court on the following agreed state of facts, viz: That the bond in suit was given by Wayne county as principal, and the other defendants as sureties, on the appeal by the county of the case of Kennicott *et. al.*, vs. The Board of Supervisors of Wayne county imp. with Mt. Vernon R. R. Co. which was a suit to foreclose a mortgage (Exhibit "A," p. 19 of record), and deed of trust (Exhibit "B," p. 24, of record) executed by said county. That an interlocutory decree (Exhibit "D," p. 26, of record), and afterwards a final decree (Exhibit "E," p. 28, of record), were rendered in the circuit court. That a copy of the bonds which said mortgage was given to secure was made part of the agreement, marked exhibit "C," p. 26, of record. That from said final decree Wayne county appealed to the Supreme Court and executed the bond sued on. That said suit was pending in the Supreme Court until April, 1877, when the decree was affirmed. Copy of said decree is marked exhibit "F," p. 30. That a sale of said lands had been made, and that the lands in the decree and mortgage and trust deed mentioned *did not bring enough at said sale to satisfy and pay the amount due the complainants under the decree as holders of the bonds of said railroad company by an amount largely over the amount of the appeal bond* in this cause sued on, and that the interest at the legal rate on the aggregate amount of the bonds of the railroad company found due the complainants as established by the decree during the pendency of said appeal would amount to a sum largely exceeding the amount of said appeal bond in this cause sued on. It was also admitted that the judgment for cost had been paid before the commencement of this suit. On this statement of facts the case was submitted to the court. The bill of exceptions also shows that the several decisions of the court in overruling motions in arrest of judgment,—for a new trial, and in finding for plaintiffs below, and entering judgment, were excepted to by plaintiffs in error at the time each of such decisions was made.

The stipulation recited in the bill of exceptions also eontained this clause: *and to each party is reserved the right to appeal to the Supreme Court from any judgment rendered herein.*

A brief statement of the facts, as shown by the records, may give a clearer view of this case than appears from the foregoing abstract of the pleadings and proceedings.

STATEMENT.

A pretended railroad company was proposing to build a road through Wayne county, and applied to that county for aid. The county was the owner of a large body of *swamp and overflowed land*, of little value, which the people had voted to donate for the purpose of building a road. The county refused to make any *other* donation than such lands, or to subscribe stock; but to carry out their proposal to appropriate the lands, they agreed to and did give a mortgage and deed of trust on such lands, as collateral security for certain bonds to be issued by said Railroad Co., *but refused to bind themselves otherwise*. A suit was brought by the present defendants in error, who were holders of such bonds, to foreclose that mortgage and deed of trust. A decree was rendered by the circuit court declaring said mortgage to be a valid lien on such lands, and ordering the same sold to pay such bonds, *but no personal judgment or decree was made against the county*. From that decree the county appealed to the Supreme Court, and executed the bond sued on,—Wayne county as principal, the other defendants as sureties. In the Supreme Court the decree of the circuit court was affirmed, and a judgment rendered against the county for $513.55 costs. This suit is brought on that appeal bond. It was agreed these costs were paid before the commencement of this suit. The case was submitted to the court on the written stipulation of the parties, made part of the bill of exceptions. That stipulation, after reciting the mortgage, decrees, bonds of the railroad company, and other exhibits set out in tbe printed record herein, contained this clause:

AGREEMENT.

"It is further agreed, that so far as the right of recovery in this case is concerned, it shall be deemed and considered that a sale of the lands in the decree described had been made and approved by the court before the commencement of this suit; and that the lands in the decree and mortgage and trust deed mentioned, did not bring enough at said sale to satisfy and pay the amount due the complainants under the decree, as holders of the bonds of said railroad company by an amount largely over the amount of the appeal bond in this cause sued on; and that the interest at the legal rate, on the aggregate amount of the bonds of the railroad company found due

the complainants and established by said decree, would amount to a sum largely exceeding the amount of said appeal bond in this cause sued on."

Six breaches were assigned in the declaration, viz:

1. Costs in the Supreme Court, $1,000.
2. Unpaid balance of the decree remaining after the sale of land mortgaged, $200,000.
3. Interest on the decree during the pendency of the appeal, $40,000.
4. Depreciation of lands pending the appeal, $50,000.
5. Attorney's fees, $25,000.
6. Taxes accumulated on the lands pending the appeal, $50,000.

These are the only claims in the declaration. The record shows the costs were paid before the commencement of this suit. P. 17 of record. The stipulation, which was the only evidence before the court, said nothing about "depreciation of lands," "attorney's fees," or "taxes;" therefore the only questions before the court on which it could find was "unpaid balance of the decree," and "interest on such decree."

Wayne county was not in any way liable for the payment of the bonds secured by the mortgage; nor did the decree purport to find any amount due from the county, or order payment by the county, but simply established a lien in favor of the holders of the railroad company's bonds, against certain lands, and ordered their sale. No part of the debt ascertained to be dueby the decree was in any event to be collected from Wayne county.

ASSIGNMENT OF ERRORS.

The plaintiffs in error assigned, on the record, the following, as causes for reversing the judgment of the circuit court, viz:

1. The court erred in finding the issues for the plaintiffs below, (the defendants in this court).
2. The court erred in overruling the motion of plaintiffs in error for a new trial.
3. The court erred in overruling the motion of plaintiffs in error in arrest of judgment.
4. The court erred in overruling the second motion of plaintiffs in error in arrest of judgment and for a discontinuance of the suit.

5. The court erred in dismissing the suit as to a part of the original defendants below, without dismissing as to all.

6. The court erred in entering a judgment for defendants and against plaintiffs in error.

BRIEF OF THE ARGUMENT OF PLAINTIFFS IN ERROR.

It has been suggested to us, by counsel for defendants in error, and we presume they are relying on it, that when the case is submitted to the court without the intervention of a jury, the finding of the court is final, and cannot be reviewed here.

In *Stimpson* v. B. & S. R. R. Co. 10 H., 345, the court said: "A preliminary question was raised in the argument of this case. It is this: Whether, as this case is not brought up either upon express or specific exceptions to the rulings of the circuit court, nor upon any decision of that court upon a special verdict found by the jury, but comes before us upon an agreed statement between the parties, this court can, in this form, take cognizance thereof. The objection thus urged is not one of the first impression in this court; it has been urged upon, and considered by, them on a former occasion, and must be regarded as having been put to rest:" and referring to the case of United States v. Eliason, 16 P. 291, quoted therefrom as follows: "This court, therefore, has no hesitancy in declaring, that the point of practice raised by defendants counsel presents no objection to the regularity in the mode of bringing this case before it." To the same effect are the cases of *Graham v. Bayne, 18 H.*, 60. *Guild v. Frontin, id.*, 138. *Suydam v. Williamson, 20 H.*, 427.

And in a recent case CLIFFORD, Justice, said: "The rule is, that whenever the error is apparent in the record, *an agreed statement of facts*, or by demurrer, the error is open to examination and correction." *Storm v. United States*, 94 U. S. 76. Sec. 649, 700, R. S. of 1875, it is understood give this court jurisdiction.

Is this agreement to submit the case properly before this court? Some of the cases speak of such agreement being spread on the record. In *Suydam v. Williamson*, 20 H., 433, the court in speaking of special verdicts, said: "It is not so much because the proceeding is denominated a special verdict, that the party by virtue of it is authorized to invoke the aid of a revisory tribunal, as it is because

it has the effect to incorporate the facts of the case into the record, which otherwise would have rested in parol, and therefore could not have been reached on a writ of error; and the same remark applies to a bill of exceptions, which is a still more comprehensive method of enlarging the record by incorporating into it not only the facts of the case, but the rulings of the court in admitting and rejecting evidence, and the instructions given to the jury; and after it is signed, sealed, and filed in the case, it becomes a part of the record, and the matters therein set forth can no more be disputed than those contained in any other part of the same record, and are alike subject to a revision in a court of error."

The agreement was duly signed by the parties; it provided the case should be submitted to the court without the intervention of a jury, on the facts contained in such agreement: the facts so agreed on were clear and explicit, and left nothing to inference; that agreement was duly incorporated in the bill of exceptions which was signed and sealed by the court, and filed in the case, and thereby became a part of the record. Then the case is properly before this court for review.

The original indebtedness was by the Mt. Vernon Railroad Co. Wayne county was in no manner a party thereto, except by executing the mortgage as collateral security. Such collateral security could not make them liable for the original debt. (This fact clearly appears by the recitals of the mortgage. P. 19 of printed record).

If A signs a note with B. he is liable for the amount of the note because he has so agreed; but if B. has given a note and A. executes a mortgage to secure it, A. is only liable to the extent of the property mortgaged, because that is his contract. He has agreed to do nothing else. That was the case here. The railroad company owed the debt: they gave the bonds. Wayne county was in no manner a party thereto, either as maker, acceptor, or grantor or otherwise; the county simply excecuted the mortgage, as collateral security merely, and to the extent of the property mortgaged, *and no further*, they were liable. If authority were needed on a question so plain, the case of *Hoag v. Starr*, 69 Ill., 362, is directly in point and conclusive. *Wood v. Fulton*, 2 Harris &

Gill, 71. *Worth v. Smith*, 5 B. Monroe, 504. *Talbot v. Morton*, 5 Little, 327.

If a party having executed a mortgage dies, and suit is brought to foreclose, his heirs, devisees, subseqent incumbrancers or others, are necessary parties. They have a right to test the validity of the mortgage without subjecting themselves to the liability of paying the mortgage debt in case they fail in their defense. In this foreclosure suit in which the appeal was taken, there were two parties. The Mt. Vernon Railroad Co. who executed the bonds described in the mortgage, and Wayne county, who executed the mortgage. Both were proper parties to the suit. The decree fixed a certain amount as due by the railroad Co. and also decreed the same to be a lien on the land mortgaged. Now from what did Wayne county appeal? Not from the decree fixing the amount the railroad owed. With that they had nothing to do. They cared not whether such amount was a thousand or a million of dollars. They appealed only from so much of that decree as declared such amount a lien on the lands mortgaged, and for that they executed the appeal bond sued on. The lands were sold under that decree and the mortgagees received the benefit of it. How then can they say Wayne county is liable any further for the original decree or interest thereon? That a party's appealing and executing an appeal bond does not make him liable for the original debt when he would not have been liable otherwise, is so conclusively shown in the case of *Kephart v. Farmers & Mech.* Bank, 4 Mich. 602, that we refer to it with confidence, believing the reasoning of the court to be unanswerable. If the mortgagees had been entitled to the possession of the land, and we by an appeal had kept them out of such possession, they might have been entitled to damages or rental value or otherwise. But even then they could not recover such damages unless their declaration claimed and the evidence showed them entitled thereto. In the present case the only allegations in the declaration on which there is any evidence, is the unpaid balance of the decree and interest thereon. Then if Wayne county was not liable for such unpaid balance and interest there was nothing on which to sustain the decision of the court below.

The appeal from the decree of foreclosure staid the sale of the

lands while such appeal was pending. It did not prevent the complainants from proceeding to collect their debt from the R. R. Co. The decree of sale was affirmed by this court. That decree was carried into execution by the sale of the land, and the holders of the bonds received the benefit thereof. The costs awarded against plaintiffs in error the record admits, have been paid paid. The only possible damage that defendants in error could have sustained would have been interest on such sum as the lands decreed to be sold would have brought. There is no claim for such damages in the declaration; there is nothing in the stipulation or elsewhere to show what said lands did sell for or what they were worth; consequently there is nothing from which the court could say what amount of damages, if any, the parties sustained. The court cannot imagine or guess that if sold, they would have brought a certain amount. Such must be shown by evidence; and as there is no such fact in the stipulation there is no case in which damages can be given.

That the rule for measuring damages is as suggested above, appears to be well established. 28 Md., 547.

There being no evidence, the most the court could do would be to give nominal damages.

Defendants in error tell us that when a party appeals and fails, his opponent is entitled to damages. If the declaration claims such damages and the evidence justifies it, then damages can be recovered. If no evidence is offered nominal damages is the extent of the right of recovery. But in the present case the parties chose to rest their case on the "unpaid balance of the decree and interest thereon," and to that they must be limited in their recovery.

If the county was not liable for the balance of the debt which the mortgage was given to secure, it could not be liable for interes thereon. This principle is too obvious to need argument. The stipulation on which the case was heard, in admitting unpaid interest, said expressly interest, "*on the bonds of the railroad company.*" P. 16 of printed record.

The case in which this appeal bond was given was a bill to foreclose a mortgage. Rule 29 of this court in relation to supersedeas bonds, provides, *inter alia*, that "in suits on mortgages," indemnity is only required in an amount sufficient to secure costs, just damages

for delay, &c. Under that rule this bond, if for no other reason, could not be extended so as to cover "unpaid balance and interest," even if the county was liable therefor, which it was not.

The plaintiffs below did not sue for damages as distinct from principal and interest. The stipulation furnishes no evidence of any claim except such "unpaid balance," and if the county was not liable therefor this case should be reversed.

The motion in arrest of judgment ought to have been sustsined.

It is a familiar principle that when part of joint obligors only are sued, a plea in abatement will be fatal to the suit. In this case we could not plead in abatement. When the case was submitted all the defendants were before the court. After finding by the court, but before final judgment, the plaintiffs below *voluntarily* dismissed the case as to two of the defendants,—joint obligors with the other defendants; the remaining defendants immediately moved in arrest of judgment. See p. 15 of printed record. It cannot be said we ought to have plead in abatement. We availed ourselves of the objection at the first opportunity after the error arose, and in the only way known to the law,—by motion to arrest the judgment.

In the courts of Illinois, where this case originated, the decisions have been uniform, that this objection is fatal to the case. From the case of *Kimmel v. Shultz*, Breese (2d Ed.) 169, to *Felsenthal et. al. v. Durand et. al.*, 86 Ill., 230, this rule has been steadily adhered to. In the last case the court said, "In actions on contract against several, when all are served with process, the judgment must be against *all or none*, unless some of the defendants make a personal defense,—as infancy, lunacy, bankruptcy, and the like." And in *Byers et. al. v. Nat'l Bank*, 83 do., 425, Walker, J., said: "We are aware of no case that holds that a plaintiff may sue a number on a contract, and take judgment against only a part of them, where no personal defense is interposed by any one of the defendants:" and in *Cummings v. The People*, 50 Ill., 132, where a default was entered and judgment against part of the defendants, the case was reversed for this cause.

If the objection appears in the first instance it may be taken advantage of by plea in abatement. If the decision of the court below is sustained the parties would be allowed to accomplish

indirectly, what they could not have done directly.

It has been supposed the case of *Minor v. Mechanics Bank*, 1 Peters, 46, conflicts with this position. In that case, on p. 73, the court said: "The question arises whether, under such circumstances, (no objection to the judgment appearing to have been made by the sureties)," &c., and in *United States v. Leffler*, 11 P., 98, the court said, "a *nolle prosequi* as to part, might be entered and judgment taken against the others, when no objectoin to the judgment against them was made by those defendants at the time." Both of these cases make the exception of *no objection being made at the time.* In the present case we made the objection immediately after the error arose, and all the time continued it. We assert the general rule is in favor of the motion as we made it: the decisions of Illinois are uniformly so, and in the cases claimed otherwise no objection was made until the hearing in the Supreme Court.

What judgment should this court render?

If we are right in our construction of the liability of plaintiffs in error no recovery can ever be had, and there is no necessity of remanding the case. In *Faw v. Roberdeau's Ex.*, 3 C., 177,—*United States v. Eliason*, 16 P., 299, and in *Graham v. Bayne*, 18 H., 63, the court reversed the cases and entered judgment in that court: and in the last case, GRIER, Justice, said: "Where there is a case stated, or special verdict, the court of error must not only reverse the judgment below, if found erroneous, but enter a correct and final judgment."

In conclusion, we repeat the propositions we have attempted to establish:

1. This court has jurisdiction to review cases decided by the circuit court on submission or agreement of parties.

2. The debt which the mortgage was given to secure was the debt of the railroad company and not of Wayne county; therefore when the property mortgaged was exhausted the liability of the county was at an end.

3. The stipulation shows all the land included in the mortgage was sold under the decree, and plaintiffs below received the benefit of it. That terminated the liability of the county.

4. The appeal being from a decree foreclosing a mortgage, the appeal bond sued on, did not, under the rules of this court, extend to the debt which the mortgage was given to secure.

5. As the stipulation on which this case was submitted only provided for the "unpaid balance of the decree and interest on the railroad bonds," if the county was not liable for the amount of the decree, *beyond the lands mortgaged*, the decision below was clearly erroneous and should be reversed.

6. The court should have arrested the judgment when plaintiffs below *voluntarily* dismissed their suit as to part of the defendants who were joint obligors with the others.

J. C. ROBINSON,
Atty. for Pltffs. in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1880.

BOARD OF SUPERVISORS OF WAYNE COUNTY, ET AL., *Appellants,*

vs.

JOHN W. KENNICOTT, ET AL., *Appellees.*

Appeal from Circuit Court of the U. S. for Southern District of Illinois.

BRIEF AND ARGUMENT FOR APPELLEES

—BY—

JAMES P. ROOT,

Attorney for Appellees.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1880.

BOARD OF SUPERVISORS OF WAYNE COUNTY, ET AL., *Appellants,*

vs.

JOHN W. KENNICOTT, ET AL., *Appellees.*

Appeal from Circuit Court of the U. S. for Southern District of Illinois.

Brief of James P. Root on behalf of Francis E. Parker, William B. Bacon and Eliza A. Wakefield, Administrators of Cyrus Wakefield, deceased: Archibald McMartin and Henry M. Alexander, executors of estate of Peter Mc Martin, deceased: Thomas Upham, executor of Wm. P. Emerson, deceased; Isaac Taylor: and heirs-at-law of Wed. W. Clarke, deceased.

THE CASE IS THUS:

On June 25th, 1874; in case of John W. Kennicott et als. *vs.* Board of Supervisors of Wayne County et als.: a decree of foreclosure was rendered by the Circuit Court

of the U. S. for the Southern District of Illinois: and the debt found due, and to be satisfied by said foreclosure, was $1,077,521.41, or thereabouts.

From this decree, an appeal was prosecuted to this Court, in accordance with sec. 1,000, Rev. Stats. U. S.; which provides, that the Judge granting the appeal, shall "take "good and sufficient security that the plaintiff in error, or "appellant, shall prosecute his writ, or appeal, to effect: "and if he fail to make his plea good, shall answer *all* "*damages* and costs, where the writ is a supersedeas and "stays execution," etc. It is now contended by the appellants, that *no damages* accrued, or are recoverable: although there was a delay of more than three years in the collection of a large debt, or in subjecting the property thereto by the taking of the appeal.

This is obviously false, both by philosophy and experience. In all business transactions—in all practical experience—in all judicial proceedings: whenever a debt is due, either by judicial determination or by contract, and its enforcement is stayed or delayed by the debtor; in every such case, damages, in the way of interest, are awarded.

No case contrariwise can be found: if so, it is a solecism, both in law and in morals.

In case at bar, there was adjudged, by a decree of the Court below, to be due from the appellant, the sum of $1,077,521.41, or thereabouts.

The collection of this debt was stayed for three years and three months: and the legal rate of interest in the State of Illinois, in cases of this kind, is six per cent. per annum.

The damages, therefore, for interest alone, would amount to the sum of $210,000: or much more than

the recovery had, or than it was possible to recover, in this case, on this limited appeal bond.

Case of Boyce's executors *vs.* Grundy (9 Pet. 290) is relied on by appellants to sustain their position, that no damages resulted to appellee or are recoverable by reason of the delays consequent on the taking of this appeal.

But as I read that case, it only decides that the Circuit Court, "IN CARRYING INTO EFFECT THE DECREE OF AFFIRM-"ANCE, can not enlarge the amount thereby decreed, but "is limited to the mere execution of the decree," etc.

But appellees are not either carrying into effect the decree of affirmance or seeking to enlarge or change the original decree: it has been executed by the Court through its proper officers precisely as it came from that court, without enlargement or other change: and the rule prescribed in the case relied on, was not violated.

But the liability upon the appeal bond was not adjudged until in this suit; and there certainly is nothing either in sections 1,000 or 1,010 of the law, or in rules 23 or 29, or in the case of Boyce executors *vs.* Grundy, to deprive appellees of their legal rights, which accrue upon a breach of the condition of the appellant's bond; or to extinguish the liability resulting from a breach of the condition of the bond. The case referred to certainly does not imply that the finding of the damages by the Supreme Court is a condition precedent to a suit upon the appeal bond: the breach of the condition in an appeal bond is certainly a basis for an action at law, and in such an action the measure of damages would depend upon the evidence of matters entirely *dehors* the record, and having no reference thereto. A jury would decide the case, not an appellate court; for the facts which would determine the liability could not be arrayed before such a tribunal. The obligees in an appeal bond are endowed with certain legal

rights; and the courts of ordinary jurisdiction are open to adjudge them, and no statute or rule of court exists, or is possible, to extinguish or abridge this common-law right. It is very manifest, that the Supreme Court can only award such damages as are incidentally suggested by the proceedings upon the appeal: no proofs can be adduced, and no arguments offered on that branch of the inquiry. Under section 1,010, the Supreme Court may, *sua sponte*, assess *extra* damages, as they are called in Abb. U. S. Pr., vol. 2, p. 267: but such damages are over and above those contemplated by section 1,000, Rev. Stat. U. S.

The language of this statute is, "Shall answer *all damages*, and costs:" not simply such as may be, incidentally seen and awarded by the Court, of its own motion; but in addition, such substantial damages as may be shown by evidence, in the not infrequent action of debt upon a bond.

Commenting upon this section, the Court has said: "It has been supposed, at the argument, that the act "meant only to provide for such damages and costs as the "Court should adjudge for delay. But our opinion is, that "this is not the true interpretation of the language. The "word "*damages*" is here used, not as descriptive of the "nature of the claim upon which the original judgment is "founded, but as descriptive of the indemnity which the "defendant is entitled to, if the judgment is affirmed."

"Whatever loss he may sustain by the judgments "not being satisfied and paid, after the affirmance these are "the damages which he has sustained, and for which the "bond ought to give good and sufficient security. (Catlett *vs.* Brodie, 9 Wheat. 553.)

The security is not to be confined to such damages as the Appellate Court may adjudge for delay. Abbotts U. S. Pract., vol. 2, p. 260.

These are termed *extra* damages; and to entitle the party obtaining an affirmance to *extra* damages, they should be awarded by the Supreme Court. (ibid. p. 267.)

These damages are assessed under Sec. 1010 of the Rev. Stat. U. S.

The provisions of this statute are altogether different from those contained in the other section.

Sec. 1000 furnishes a method by which a party damnified by an improper appeal may obtain reparation in damages, viz: by compelling him to answer *all damages*, etc.: but sec. 1010 vests in the Court authority to act itself by inflicting a punishment upon a suitor who should prosecute an improper appeal. It is in the *discretion* of the Court to act under the authority of sec. 1010.

But the liability of the appellant to answer all damages, "if he fail to make his plea good," is absolute, both by sec. 1000, as well as by the clearest principles of common law.

By Sec. 1000 a right of action is accorded to the appellee; and it is absolute and positive: while by sec. 1010 a discretion is also vested in the Court to mulct the delinquent appellant for his delinquency.

Sec. 1010 is just as operative without as with a bond: the bond gives the authority for the action in sec. 1000: while the law itself, by its own force, and without the intervention of a bond, enforces the remedy prescribed by the provisions of sec. 1010.

Nor do rules 23 and 29 interfere with this view: rule 23 fixes the date from which interest shall be computed upon a judgment, thus confirming the idea that damages in the shape of interest shall accrue upon a delayed, or stayed, judgment: it also provides for primitive damages *in addition to interest* when the appeal was *mala fide;* thus

carrying out the idea of damages by delaying the judgment by appeal; and still greater damages in case of bad faith.

But still, when a judgment is delayed, interest must follow, is the principle running through the whole context: and it can hardly be conceivable that because the Supreme Court, by mistake or inadvertence, has omitted to assess the damages or to compute the interest, that such damages, which are manifestly due and proper, are irretrievably lost to the injured party.

2

The decree of foreclosure might be satisfied: (1.) By payment of the debt adjudged to be due; or, (2.) By a subjection of the land embraced in the mortgage to the satisfaction thereof.

If the decree had been satisfied by the first method, the damages would have embraced as one element, interest on the whole nominal debt; but if it was satisfied by a subjection of the land itself, a part or all of the debt was technically and substantially extinguished, and therefore paid by such subjection of the land.

If all of the debt was extinguished by the subjection of the land thereto, the effect is precisely the same as if the debt had been paid in money, and the damages for the delay in payment should be the same in one case as in the other.

But if the debt was only partly extinguished by a subjection of the land, then the land was of less value than the debt, and the damage for delay in acquiring this property, which to the appellees stood in lieu of money, would be correspondingly less.

In so far as the debt was extinguished in any way; to that extent payment either absolutely or *sub modo* was

in effect made to the appellees, and the quantum of payment in any way is the test of damages which occurred from the delay thereof.

The intrinsic value of the land is not a proper element of consideration: its availability as payment is the test of its value to appellees, and their damage is the delaying them in the acquisition of this medium of partial payment; whether its availibility as payment was equal to its intrinsic value does not matter. The appellees had a right for themselves to determine its value to them as payment; appellants received the full benefit of the credit on the decree, and are bound to respond in damages for delaying appellees in the acquisition of this value which by them in a matter concerning their interest they rendered fixed and absolute.

3.

The judgment should be affirmed with damages for the delay, in accordance with Sec. 1010.

Respectfully submitted,

JAMES P. ROOT,
for Appellees.

SUPREME COURT U.S.
FILED
JAN 22 1908
JAMES H. McKENNEY, Clerk

Supreme Court of the United States.

No. 219.

THE BOARD OF SUPERVISORS OF WAYNE COUNTY, OLIVER HOLMES, THOMAS L. COOPER, WILLIAM SHAEFFER, ET AL. PLAINTIFFS IN ERROR,

vs.

JOHN W. KENNICOTT, JOSEPH W. WARD, ET AL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

BRIEF AND ARGUMENT OF DEFENDANTS IN ERROR.

Supreme Court of the United States.

October Term, A. D., 1880.

THE BOARD OF SUPERVISORS OF WAYNE COUNTY, OLIVER HOLMES, *et al* Plaintiffs in error,

vs.

JOHN W. KENNICOTT, *et al*, Defendants in error.

Error to the Circuit Court of the United States for the Southern District of Illinois.

Brief and argument for HOSEA BIRDSALL, CLARK L. POTTER, JAMES O. FAIRCLOTH, HENRY FULLER, J. L. BLAKELEY, JOSEPH WAXELBAUM, OLIVER D. TAYLOR, THOMPSON E. F. RANDOLPH, WILLIAM C. POTTER and LUCIUS F. REED, JAMES S. HENDRICKSON, BENJAMIN WISE, CALEB UNDERHILL, defendants in error.

The case, as it appears from the record, is substantially stated in the brief submitted on the part of the plaintiff in error, supplemented by that on the part of the defendants in error (named therein) submitted by James P. Root, Esq.

It does, however, appear from the record that the bond upon which this suit was predicated was joint and several (Record, folio 12).

And that the appearance of James McCartney was by a separate answer filed by him (Record folio 15), and that of J. L. Handley was also a separate appearance. By motion for a new trial based upon his non-approval of the agreement (to which he was not a party), submitting the case for trial, and reliance upon the demurrer interposed by *all*, and left separate and alone as to him by such agreement. (Record, folio 18, *Demurrer*).

So that as to these defendants (McCartney and Handley), after the agreement and submission made by the other defendants *sued*, the case stood substantially upon the separate answer of McCartney, and the demurrer of Handley, and upon the granting of their respective motions for a new trial so stood at the time of the entering of the *nolle prosequi* as to them. (Record. folio 33).

The record (folio 13) also shows that all the parties to the bond were not *sued*, and are not parties to the record.

FIRST.—The agreement under which the case was submitted to Judges Treat and Drummond at the Circuit Court by the parties now of record, if valid for the purpose of a trial by the Court, amounted to a waiver of all questions affecting the jurisdiction of that Court, as to the parties so submitting, and no assumed plea was proper in connection with the facts, except one special in its character, by admissions or going to the *writ*.

SECOND.—The case, as to the plaintiffs in error, therefore, presents them, as submitting their persons and the subject in controversy to the tribunal named in the agreement upon the merits of the case thus presented, and as sole parties to the record. As to the parties, McCartney and Handley, they were not parties to that submission or trial under it, nor did the *nolle prosequi* subsequently entered as to them, in any manner affect the position of such of the plaintiffs in error as were parties to it, and such parties were not then nor are they now at liberty to aver that all the joint obligors were not *sued*, or that the judgment was not of force as against them, because not rendered against all the parties *sued*. For the reason that such defect (if it was so) could only be reached by plea in abatement, and such plea or objection in any form was waived by the submission it is clear, that the plaintiffs in error did not rely upon the fact that all the parties obligors to the bond

were not sued, and it is equally clear that the motion of such parties (folio 32) to discontinue the suit, and in arrest of judgment, because the case had been voluntarily discontinued as to McCartney and Handley, was waived by such submission, but it is submitted in this connection that the discontinuance of the suit against two of the parties sued, did not have the effect claimed by the plaintiffs in error, for the reasons assigned by this Court in United States vs. Laffl n, (11 Peters, 86-97), citing and reading with approval from Minor vs. Mechanics' Bank (1 Peters, 46). "The Court, in reasonin: upon the case of Minor vs. Mechanic's "Bank (*supra*), admitted that upon a joint and several bond the "plaintiffs ought to sue *all jointly or one severally*."

They say, however, that the objection was not fatal to the "merits, but was pleadable in abatement only, and if not so "pleaded, is waived by the pleading to the merits. They said "therefore, if the suit had been brought against the four sureties "only, and they had omitted to take the exception by plea in "abatement, the judgment in that case would have been unim-"peachable."

"They then enquire whether the legal predicament of the "case was changed by having *sued* all the parties, and subse-"quently having entered a *nolle prosequi* against one of them? "And if not in general, then whether there was any difference "when the party in whose favor a *nolle prosequi* had been entered "was not a surety, but a principal on the bond. The Court, after "an elaborate examination of these question, both upon principle "and authority, came to the conclusion that when the defendants "*sever* in the pleadings, a *nolle prosequi* ought to be allowed. That "it was a practice that violates no rule of pleading, and will gen-"erally subserve the public convenience."

"That in the administration of justice, matters of form, not "absolutely subject to authority, may well yield to the substant "tial purposes of Justice."

In the case at bar the submission amounted to a plea upon the merits as to the parties joining in it, and if the decision was against them, they would be bound by it, as having consented to such a judgment against themselves without a question as to other parties like situated, *sued* or *not sued*, relying soly upon the facts as not

warranting a recovery against them, and placing themselves before the Court below as the only parties *obligors*, and the only parties whose interests were to be affected, or that should be joined with them in the judgment or *sued*, for the purpose of setling their immediate rights as obligors in the bond *sued* on, or their ultimate rights as between *all the obligors*, themselves included. As to McCartney and Handley, the cause, was not tried in an manner.

That this is the only proper view of the proceeding reviewed is obvious, and this Court, it is confidently believed, will so view it, if the questions thus presented are regarded as of importance enough for examination, but if the Court shall hold with the defendants in error in the view of the case hereinafter taken, such examination will be unnecessary.

The refusal of the Court to grant a new trial is not reviewable in this Court upon a writ of error.

II.

This cause was, as to the parties plaintiffs in error, as appears from the record duly submitted to the "Court for trial by the same without the intervention of a Jury," and was so tried, and after hearing the proofs and allegations of the parties the Court found the issue in favor of the plaintiff, etc., * * * and gave judgment accordingly (Record, folio 24). This judgment was entered of Record on the 14th day of May, 1878.

The record, through the bill of exceptions, shows such *proofs* to have been a written agreement between the parties before referred to submitting the cause to Judges Treat and Drummond for trial upon an agreed state of facts.

The record does not show that any agreement in writing was made between the parties or their attorneys "so submitting the case for trial without the intervention of a Jury," and filed with the Clerk, "*waiving a Jury.*"

So that in this case the Court did not sit as a Court of law but as *quasi* arbitrators, and the parties so submitting are bound

by the judgment, and cannot have a review on error, of any ruling of the Court on such trial, although the record shows the cause tried without the intervention of a jury, and thus affirmatively the "waiver of a jury," yet it does not appear that such case was submitted in writing under the statute (§649, R. S.), such waiver is sufficient to support the judgment, but not sufficient to author. ize a review of the rulings of the Court at the trial.

Norris vs. Jackson, 9 Wallace 125.
Flanders vs. Tweed, ib. 425.
Kearney vs. Case, 12 Wallace 275.
Miller vs. Life Ins. Co., ib. 285.

III.

The Statute (R. S. §649–700) was designed to remove this difficulty, and provided a mode by which the parties who agreed to waive a jury should have the benefit of a writ of error to the rulings of the Court on questions of law.

"We cannot believe that Congress intended to say that par-
"ties shall not as heretofore submit their cases to the Court unless
"they do so by a written stipulation, but that it was the intention
"to enact that if parties who consent to waive a jury desire to se
"cure the right to a review in the Supreme Court of any question
"of law arising in the trial, they must first file their written stipu-
"lation, and must then ask the Court to make a finding of such
"facts as they deem essential to the review, and ask the ruling of
"the Court on points to which they wish to except. If this is
"not done the parties consenting to waive a jury stand as they did
"before the statute concluded by the judgment of the Court upon
"all matters submitted to it," (Miller, J. in Kearney vs. Case, supra.)

But there can be no review under the statute cited unless the agreement to waive the jury is first signed and filed with the clerk, and the record shows that fact.

It is not necessary that a full copy of such agreement should appear in the record, but it must appear from the findings of facts by the Court, or in the bill of exceptions, or in the record of the judgment entry, that such a stipulation was made in writing (Kearney v. Case, supra.)

No such agreement or stipulation (if made) appears from any of the records in this case.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1880.

NO. 219.

THE BOARD OF SUPERVISORS OF WAYNE COUNTY, ILLINOIS et al.,

vs.

JOHN W. KENNICOTT et al.,

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

Argument of Walter B. Scates for the Defendants in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1880.

THE BOARD OF SUPERVISORS OF WAYNE COUNTY, ILLINOIS et al.,

vs.

JOHN W. KENNICOTT et al.,

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

Suit to foreclose a mortgage and deed of trust given by Wayne County as a collateral security to secure the bonds of the Mount Vernon Railroad Company, was brought by Kennicott *et al.* on the 7th day of March, 1865. The bill was dismissed in 1871, and the case brought by appeal to this court, where it was reversed and the validity of the mortgage and deed of trust, and the right to a foreclosure established by the decision of this court, reported in 16 Wallace, 452. The defendant in that case, one of the appellants in this case, took some additional immaterial testimony and appealed from the decision of foreclosure to this court, in the hope of obtaining a reversal of their former decision. The decree of foreclosure was affirmed by the decision of this court, and reported in 94 U. S. Reports, 498.

Thereupon suit was brought upon the appeal bond against the principal and sureties, some eighty or more in number, and service had upon some twenty-six, more or less. Two of the parties served put in separate defenses. The remainder of those served entered into an issue for all served, and a stipulation in relation to the evidence. The issue was submitted to the court and found for the plaintiffs, in debt forty thousand dollars, the penalty of the appeal bond, and assessed their damages at forty thousand dollars, to be paid in full satisfaction of the debt. The court granted a new trial to the two parties, who had pleaded severally, and thereupon the plaintiffs entered a *nolle prosequi*, as to those two defendants. The appellants here thereupon entered their motion in arrest of judgment, which was overruled by the court, and the judgment rendered upon the finding of debt and damages. The appellants tendered a bill of exceptions, containing the evidence in the case, and these subsequent proceedings, which they have thus spread of record.

The court will perceive that the bill of exceptions (pages 15 to 31 of printed record) sets forth the evidence offered in the case, and not a special finding of facts; but the court, in a general verdict, "found for "plaintiffs $40,000 debt, being the penalty of the appeal bond sued on, "and $40,000 damages, to be discharged on payment of the damages." (See printed record, p. 17.)

Under this statement of the pleadings and evidence, I submit:

I.

That in the case of 20 Howard, 430, *Saylor* v. *Williamson*, this court stated exhaustively the various modes in which the evidence introduced in the court below,—a special verdict finding facts; a demurrer to evidence; the rulings of the court upon the admissibility of evidence, or upon special finding of facts by verdict, stipulation or finding of the court,—might become matters of record by bill of exceptions presenting the one or the other of those various modes of presenting the evi-

dence, the facts, the findings and rulings of the court for the consideration of this court, and the effect of the one or the other mode of presenting the same; as to the power and jurisdiction of this court to revise the same.

The case at bar has presented, by bill of exceptions, *the evidence* in the court below only, and the finding of the court only upon that evidence.

In the case of *The* "*Abbotsford*," 98 U. S. (8 Otto) 440, the court holds that this court will not revise or consider the evidence presented in the court below. No distinction is made between cases tried by a jury and those by the court; and if the trial is had by a jury, it is clear that the verdict is conclusive upon this court. By the constitutional amendment VII., no fact tried by a jury can be otherwise re-examined on the facts in this court, because, under the rules of the common law, a bill of exceptions could not be used for that purpose.

Upon the authorities before cited I submit the question, whether this court has power or jurisdiction, or will, according to the practice of this court, revise or examine the evidence in the court below with a view to determine whether the evidence did or did not authorize the finding or conclusion of the court upon it.

Therefore I consider all the authorities cited by appellants tending to show that they were not liable for the debt as mortgagors on a collateral security, and that this court could revise and redetermine what ought to have been the verdict of a jury, or finding of the court upon the evidence submitted in the case, as wholly inapplicable in this case.

II.

By section 914, Revised Statutes U. S., page 174, it is provided that in the Circuit and District Courts of the United States, the practice, pleadings and forms and modes of proceeding in civil causes shall conform, as near as may be, to the forms and modes of proceeding in like causes in the courts of record of the State.

By Rev. Stat. Illinois, 1877, page 737, section 24, it is provided that amendments introducing or discontinuing any party necessary to be joined as plaintiff or defendant, changing the form of the action in any matter, either of form or substance, in any process, pleading or proceeding which may enable the plaintiff to sustain the action for the claim for which it was intended to be brought, or the defendant to make a legal defence, the adjudication of the court allowing an amendment shall be conclusive evidence of the identity of the action.

As to all defendants not served with process, or who may be made defendants by amending the declaration under the former section, the 10th section, Rev. Stat., Illinois, 1877, page 735, a *scire facias* or summons may be issued, and such parties not served, or such as may be made new parties by amendment of the declaration, may be brought in and judgment obtained against them for the same debt and damages.

In answer to the point made by appellants that the court below should have arrested the judgment after a *nolle* had been entered as to two of the defendants, because the judgment must be against all or none, it is only necessary to refer this court to the statutes above mentioned, and to the case of *Minor* v. *Mechanics' Bank*, 1 Peters, p. 46.

In that case Mr. Justice STORY, delivering the opinion of the court, after a thorough review of authorities, states:

"The result of this examination into authorities is, that there is "no decision exactly in point to the present case; that there is no "distinction between entry of a *nolle prosequi* before, and the entry "after judgment, applicable to the present facts. That the authori- "ties, and particularly the American, proceed upon the ground that "the question is a matter of practice, to be decided upon considera- "tions of policy and convenience, rather than a matter of absolute "principle; and that, therefore, this court is left at full liberty to en-

"tertain such a decision as its own notions of general convenience "and legal analogies would lead it to adopt. WE ARE OF OPINION "THAT WHERE THE DEFENDANTS SEVER IN THEIR PLEADINGS, A "NOLLE PROSEQUI OUGHT TO BE ALLOWED. It is a practice which "violates no rules of pleading, and will generally subserve the public "convenience. In the administration of justice, matters of form not "absolutely subjected to authority may well yield to the substantial "purposes of justice."

The foreclosure case of *Kennicott et al.* v. *The Board of Supervisors of Wayne County, Illinois*, after five years preparation and delay, was brought to this court in 1871, and in 1873 the validity of the mortgage deed of trust and the railroad bonds secured by them were estab lished, as reported in 16 Wall., 450.

Instead of submitting to that decision, the defendant took some immaterial evidence and appealed from the decree of foreclosure rendered in June, 1874, giving the bond sued on, entertaining the hope of inducing the court to revise its former decision. In this it failed, and in 1877 the decree of foreclosure was affirmed, with costs. The appeal was frivolous, and for mere delay. But we could gain nothing by asking damages to be added to a decree, for greatly more already than the property would pay. We then sold the lands, leaving some half million of debt and interest unpaid. We have since brought suit and obtained judgment upon the appeal bond for $40,000, less by $20,000 and more than one year's interest on the foreclosure decree, and less by $140,000 than the interest for three years, pending the appeal. We have lost $140,000 and more in interest alone by the delay on the appeal, to say nothing of the loss in value of the lands by depreciation during three years of panic from 1874 to 1877. The county again sues out a writ of error with *supersedeas* on this judgment, taking another three years' delay and credit, on the frivolous pretext that the appeal only made it liable for the costs of the appeal. By the time we can get a decision we shall have reached a period of sixteen years.

We now have a personal judgment against the county, and are in position to ask this court to assess that class of damages that this court may assess and allow upon affirmance. We therefore ask an affirmance with cost, double costs, interest from date of judgment, in July, 1878, and 10 per cent. additional interest for delay. It is time to teach litigants that judgments are not farces, and that the court has power to protect parties in rights adjudged to them.

WALTER B. SCATES,

Attorney for Defendants in Error.